CLERK'S COPY.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 273.

DAVID KAWANANAKOA, JONAH KALANIANAOLE, ABIGAIL W. KAWANANAKOA, AND ELIZABETH K. KALANIANAOLE, APPELLANTS,

vs.

ELLEN ALBERTINA POLYBLANK, OTHERWISE KNOWN AS SISTER ALBERTINA, TRUSTEE FOR STELLA KEOMAILANI COCKETT, AND STELLA K. COCKETT, SOLE BENEFICIARY UNDER SAID TRUST.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF HAWAII.

FILED APRIL 26, 1906.

(20,223.)

Supreme Court of the United States, October Term, 1906.

No. 273.

DAVID KAWANANAKOA, JONAH KALANIANAOLE, ABIGAIL W. KAWANANAKOA, and ELIZABETH K. KALANIANAOLE, Appellants,

vs.

ELLEN ALBERTINA POLYBLANK, Otherwise Known as Sister ALBERTINA, Trustee for Stella Keomailani Cockett, and STELLA K. COCKETT, Sole Beneficiary under said Trust, Appellees.

Appeal from the Supreme Court of the Territory of Hawaii.

Stipulation.

Whereas the Demurrer of the Territory of Hawaii, one of the respondents named in the Bill of Complaint herein, was inadvertently omitted from the præcipe, designating parts of the record to be included in the transcript herein, and was by reason thereof not included in said transcript;

It is therefore stipulated and agreed by and between David Kawananakoa, Jonah Kalanianaole, Abigail W. Kawananakoa, and Elizabeth K. Kalanianaole, appellants, and Ellen Albertina Polyblank, otherwise known as Sister Albertina, Trustee for Stella Keomailani Cockett, and Stella K. Cockett, sole beneficiary under said trust, through their respective attorneys, that the annexed certified copy of said Demurrer may be filed herein and may be treated and considered a part of the record for all purposes as if it had been duly and regularly included in said transcript.

Dated Honolulu, February 19, 1907.

SIDNEY M. BALLOU,
Attorneys for Appellants.
A. B. BROWNE,
ALEX. BRITTON,
Attorneys for Appellees.

In the Circuit Court of the First Circuit, Territory of Hawaii, at Chambers.

Equity No. —. In Probate.

ELLEN ALBERTINA POLYBLANK, Otherwise Known as Sister ALBERTINA, Trustee for Stella Keomailani Cockett, Complainant,

vs.

DAVID KAWANANAKOA, JONAH KALANIANAOLE, ABIGAIL W. KAWANANAKOA, ELIZABETH K. KALANIANAOLE, THE GERMAN SAVINGS & LOAN SOCIETY OF SAN FRANCISCO, a Corporation, and THE TERRITORY OF HAWAII, Respondents.

Bill for Foreclosure of Mortgage.

Demurrer of the Respondent, the Territory of Hawaii.

Now comes the Territory of Hawaii, by Lorrin Andrews, Attorney General, respondent in the above entitled action, and demurs to complainant's Bill of Complaint on file herein on the ground that said Bill of Complaint does not state facts sufficient to constitute a cause of action.

THE TERRITORY OF HAWAII, *Respondent,*
By L. ANDREWS, *Attorney General.*

I hereby certify that the said demurrer is not interposed for the purpose of delay.

L. ANDREWS,
Attorney General.

Service of a copy of the within Demurre- this day admitted.
Dated Honolulu, Oct. 27, 1904.

E. A. DOUTHITT,
Attorney for Complainant.

(Endorsed:) Circuit Court of the First Circuit, Territory of Hawaii, at Chambers. In Equity. Ellen Albertina Polyblank, otherwise known as Sister Albertina, Trustee for Stella Keomailani Cockett, Complainant, *vs.* David Kawananakoa, Jonah Kalanianaole, Abigail W. Kawananakoa, Elizabeth K. Kalanianaole, the German Savings & Loan Society, a corporation, and the Territory of Hawaii, Respondents. Demurrer of Respondent, the Territory of Hawaii. Filed October 27, 1904, at 10:18 A. M. J. A. Thompson, Clerk. Lorrin Andrews, Attorney General.

Certificate of Clerk.

HONOLULU, OAHU, *Territory of Hawaii, ss:*

I, Henry Smith, Clerk of the Supreme Court of the Territory of Hawaii, do hereby certify the above and foregoing copy of the Demurrer of the Territory of Hawaii, together with the endorsements thereon filed with the Clerk of the Circuit Court of the First Circuit of the Territory of Hawaii in the case entitled in said Circuit Court "Ellen Albertina Polyblank, otherwise known, as Sister Albertina, Trustee for Stella Keomailani Cockett and Stella K. Cockett, sole beneficiary under said trust, *vs.* David Kawananakoa, Jonah Kalanianaole, Abigail W. Kawananakoa and Elizabeth K. Kalanianaole, and the German Savings & Loan Society, a corporation, and the Territory of Hawaii, to be a full, true and correct copy of said Demurrer.

And I do further certify that said Demurrer was a part of the record before the Supreme Court of the Territory of Hawaii in said cause.

In testimony hereof I have hereunto set my hand and caused the seal of the Supreme Court of the Territory of Hawaii to be hereunto affixed at Honolulu in said Territory this 19th day of February, A. D. 1907.

[Seal Supreme Court, Territory of Hawaii.]

HENRY SMITH,

Clerk of the Supreme Court of the Territory of Hawaii.

[Endorsed:] File No. 20,223. Supreme Court U. S., October Term, 1906. Term No. 273. David Kawananakoa *et al.*, App'ts, *vs.* Ellen Albertina Polyblank *et al.* Stipulation and addition to record. Filed March 6", 1907.

(20,223.)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1906.

No. 273.

DAVID KAWANANAKOA, JONAH KALANIANAOLE, ABIGAIL W. KAWANANAKOA, AND ELIZABETH K. KALANIANAOLE, APPELLANTS,

vs.

ELLEN ALBERTINA POLYBLANK, OTHERWISE KNOWN AS SISTER ALBERTINA, TRUSTEE FOR STELLA KEOMAILANI COCKETT, AND STELLA K. COCKETT, SOLE BENEFICIARY UNDER SAID TRUST.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF HAWAII.

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1 In the Supreme Court of the Territory of Hawaii.

DAVID KAWANANAKOA, JONAH KALANIANAOLE, ABIGAIL W. KAWANANAKOA, and ELIZABETH K. KALANIANAOLE, Appellants,

vs.

ELLEN ALBERTINA POLYBLANK, Otherwise Known as SISTER ALBERTINA, Trustee for Stella Keomailani Cockett, and STELLA K. COCKETT, Sole Beneficiary under said Trust, Appellees.

Præcipe Designating Parts of Record to be Included in Transcript.

To Henry Smith, Clerk of the Supreme Court of the Territory of Hawaii:

You are requested to make a transcript of the record in the Supreme Court of the Territory of Hawaii in the cause entitled in said Court "Ellen Albertina Polyblank, otherwise known as Sister Albertina, Trustee for Stella Keomailani Cockett and Stella K. Cockett, sole beneficiary under said Trust, *vs.* David Kawananakoa, Jonah Kalanianaole, Abigail W. Kawananakoa and Elizabeth K. Kalanianaole and The German Savings & Loan Society, a corporation" and to include in such transcript of record the following and no other papers and exhibits, to wit:

1. Bill of Complaint.
2. Summons.
3. Plea of David Kawananakoa, Jonah Kalanianaole, Abigail W. Kawananakoa and Elizabeth K. Kalanianaole.
4. Answer of the German Savings & Loan Society.
5. Dismissal as to the Territory of Hawaii.
6. Amended answer of David Kawananakoa, Jonah Kalanianaole, Abigail W. Kawananakoa and Elizabeth K. Kalanianaole.
7. Decree of foreclosure.

2 8. Copy of Clerk's Minutes.

9. Notice of appeal.
10. Decision of Supreme Court rendered October 23, 1905.

Respectfully,

SIDNEY M. BALLOU,
Attorneys for Appellants.

3 In the Circuit Court of the First Circuit, Territory of Hawaii, at Chambers. In Equity.

Equity. No. —.

(Stamps, $2.00.)

M. T. S., Clerk.

ELLEN ALBERTINA POLYBLANK, Otherwise Known as SISTER ALBERTINA, Trustee for Stella Keomailani Cockett, and STELLA KEOMAILANI COCKETT, Sole Beneficiary under said Trust, Complainant-,

vs.

DAVID KAWANANAKOA, JONAH KALANIANAOLE, ABIGAIL W. KAWANANAKOA, ELIZABETH K. KALANIANAOLE, THE GERMAN SAVINGS AND LOAN SOCIETY, a Corporation, and THE TERRITORY OF HAWAII, Respondents.

M. T. S.

Bill for Foreclosure of Mortgage.

Bill of Complaint.

To the Presiding Judge, at Chambers, of the Circuit Court of the First Circuit, Territory of Hawaii:

The Petition of Ellen Albertina Polyblank, otherwise known as Sister Albertina, Trustee for Stella Keomailani Cockett, respectfully shows unto your Honor:

I.

That complainant and the respondents David Kawananakoa, Jonah Kalanianaole, Abigail W. Kawanakoa, and Elizabeth K. Kalanianaole, are all residents of Honolulu, Island of Oahu, Territory of Hawaii.

That the respondent The German Savings and Loan
M. T. S. Society is a corporation organized and existing under and by virtue of the laws of the State of California, and also doing business at Honolulu, Island of Oahu, Territory of Hawaii.

4 II.

That on the 19th day of October, 1899, Stella Keomailani Cockett, of Honolulu, Island of Oahu, Territory of Hawaii, signed, sealed and delivered to Complainant Ellen Albertina Polyblank, under the name of Sister Albertina, a certain deed of trust in and to the hereinafter described property a copy of which said deed of trust is annexed hereto and made a part hereof, marked "Exhibit A;" and that at the time of the execution and delivery of said deed of trust James D.

Cockett of Honolulu, Island of Oahu, Territory of Hawaii was the husband of said Stella Keomailani Cockett, and as such joined in the execution of said deed of trust in token of his consent thereto and in release of all his right title, or interest in and to said property hereinafter described.

III.

That under and by virtue of the terms and conditions of the aforesaid deed of trust, the said Ellen Albertina Polyblank as such trustee, was empowered and directed in her discretion at any time upon the request of the said Stella Keomailani Cockett, to sell and convey the property therein conveyed, a portion of which is hereinafter and in the next paragraph hereof described.

IV.

That on the 8th day of May, A. D. 1902, the said Complainant Ellen Albertina Polyblank, as such trustee, together with the said Stella Keomailani Cockett in her own right, and the said James D. Cockett, husband of the said Stella Keomailani Cockett, joining therein in token of his consent thereto, did execute under their hands and seals and deliver to the said respondents David Kawananakoa and Jonah Kalanianaole a certain deed, a copy of which is annexed hereto and made a part hereof marked "Exhibit B," wherein said Ellen Albertina Polyblank as such trustee, and said Stella Keomailani Cockett, and said James D. Cockett conveyed to the said David Kawananakoa and the said Jonah Kalanianaole all their right title and interest in and to the following described property, to wit:—

All that portion of the land described in Royal Patent No. 4371, L. C. A. 7260 to B. Namakeha, included within the following metes and bounds, to wit: Beginning at the East corner of Grant 2363 on the Waikiki side of Nuuanu Avenue the same being the west corner of the proposed new Extension of Kuakini Street and Nuuanu Avenue, and running as follows by true bearings:

N. 41° 15′ E., 375.0 feet along Nuuanu Avenue;
S. 84° 20′ E., 283.7 feet along Pauoa Road;
N. 89° 44′ E., 134.5 feet along same;
N. 82° 32′ E., 180.6 feet along same;
S. 21° 12′ E., 265.0 feet along Ulu's place;
S. 58° 10′ W., 216.5 feet along L. C. A. 85 F. L. and 6059;
S. 56° 15′ W., 125.0 feet along L. C. A. 236;
S. 62° 05′ W., 82.6 feet along same;
S. 74° 10′ W., 107.5 feet along same;
N. 7° 05′ W., 10.0 feet along L. C. A. 1144B., Apana 2;
S. 86° 35′ W., 52.5 feet along same;
N. 32° 20′ W., 70.0 feet along same;
S. 45° 30′ W., 61.0 feet along same;
N. 41° 20′ W., 161.5 feet along same;
S. 45° 55′ W., 92.0 feet along same and L. C. A. 7675;
N. 49° 15′ W., 215.0 feet along Grant 2363 to the initial point, and containing an area of 316,284 square feet or 7 26/100 acres, more or less.

Excepting and reserving (unto said Grantors) all remaining portion of the land described in said Award and also the lele of
6 the ili of Kaalaa which is covered by Mahele Award No. 61, Royal Patent No. 7429, the title of said lele at the time of the above described conveyance being litigated in the Supreme Court of the Territory of Hawaii.

Complainant further alleges that the above described premises are part of the same premises conveyed to said Ellen Albertina Polyblank, trustee as aforesaid, by deed of trust hereinbefore referred to.

V.

That on the 8th day of May, 1902, the said respondents David Kawananakoa and Jonah Kalanianaole, as and for part of the purchase price of said hereinabove described property, made executed and delivered to complainant as such trustee, their certain promissory note, in words and figures following, to wit:

"$8,000.00. HONOLULU, *May 8th*, 1902.

" One Year after date, for value received, we jointly and severally " promise to pay to Ellen Albertina Polyblank, otherwise known as " Sister Albertina, Trustee for Stella K. Cockett, or order, in Hono- " lulu, the sum of Eight Thousand Dollars, with interest payable " semi-annually at the rate of Seven per cent. per annum during " said term, and for such further time as said principal sum or any " part thereof shall remain unpaid. Both Principal and Interest " payable in Gold Coin of the United States of America of the present " standard of weight and fineness.

"(S'g.) D. KAWANANAKOA.
"(S'g.) J. KALANIANAOLE.

" Executed in presence of
"(S'g.) C. A. LONG.

"Secured by Mortgage of Even Date herewith." (Endorsed on Margin.)

VI.

And that as security for said promissory note said respond-
7 ents David Kawananakoa and Jonah Kalanianaole did execute under their hands and seals and deliver to complainant on said 8th day of May, 1902, a certain mortgage on said above described property, a copy of which said mortgage is attached hereto and made a part hereof, marked "Exhibit C."

VII.

That the said respondent Abigail W. Kawananakoa is, and was at the time of the execution and delivery of said mortgage, the wife of the said David Kawananakoa, and that the said Elizabeth K. Kalanianaole is and was at the time of the execution and delivery of said mortgage the wife of the said Jonah Kalanianaole; and that the said respondents Abigail W. Kawananakoa and Elizabeth K. Kalania-

naole signed and sealed said mortgage at the time the same was executed by the said David Kawananakoa and the said Jonah Kalanianaole for the purpose of releasing all right or possibility of dower in and to the above described premises; and that by and under the terms of said mortgage the said Abigail W. Kawananakoa and the said Elizabeth K. Kalanianaole did release all right and possibility of dower in and to the said above described premises.

VIII.

That said mortgage contained the following condition, viz: that if the said David Kawananakoa and the said Jonah Kalanianaole should pay unto complainant the sum of Eight Thousand Dollars within One Year from the date thereof, with interest semiannually at the rate of seven per cent. per annum thereon, and until such payment, should pay all taxes and assessments on the above described premises, then said above described mortgage together with said above described note should be void.

IX.

That said mortgage was duly acknowledged on the said 8th
8 day of May, 1902, and recorded in the Office of the Registrar of Conveyances at Honolulu, Oahu, on the said 8th day of May, 1902, in Liber 232 on pages 422, 423 and 424.

X.

That default has been made by the said respondents David Kawananakoa and Jonah Kalanianaole in the performance of the condition of said mortgage above referred to.

That the principal sum represented by said note is now due and that the interest thereon has not been paid since the 25th day of June, 1903; and that there is now due and unpaid on said note and mortgage the whole of the principal sum secured thereby, together with interest thereon at the rate of seven per cent. per annum from the 25th day of June, 1903.

XI.

That demand has been made upon the said respondents David Kawananakoa and Jonah Kalanianaole for the payment of the principal sum mentioned in said note and mortgage together with the accrued interest thereon, but that the said respondents David Kawananakoa and Jonah Kalanianaole have, and each of them has, refused and neglected and still refuse and neglect to pay the same, or any portion thereof.

XII.

That the respondent The German Savings and Loan
M. T. S. Society, has or claims some interest in or lien upon said above described premises, the exact nature of which is unknown to complainant, but the same whatever it may be is subsequent to and subject to the lien of said mortgage.

XIII.

That the respondent the Territory of Hawaii has or claims to have some interest or claim upon said above described premises or some portion thereof, as a purchaser, the exact nature of which is unknown to complainant, but the same whatever it may be is subsequent to and subject to the lien of complainant's mortgage.

XIV.

That by reason of the facts hereinbefore set forth complainant is entitled to a foreclosure of said mortgage for the payment of said indebtedness together with legal interest thereon and to a sale of the property described in said mortgage to satisfy complainant's claim.

XV.

That complainant has no plain, speedy or adequate remedy at law and complainant can have relief only in a court of equity where matters of this kind are properly cognizable.

Wherefore, complainant prays as follows:

1. That said respondents and each of them be summoned to appear and answer this bill of complaint.

2. That the amount due and payable to complainant under said mortgage may be ascertained by the Court.

3. That after a hearing being had hereon, it may be ordered and decreed that said mortgage be foreclosed; that all the property covered thereby may be sold at public auction by a commissioner or other officer of this Court; that the proceeds of such sale, after paying the costs and expenses of foreclosure, together with a reasonable attorney's fee, be applied to the payment of the indebtedness secured by said mortgage; that in case the proceeds of such sale are insufficient to pay such indebtedness that said res-ondents David Kawananakoa and Jonah Kalanianaole be decreed to pay the deficiency to complainant; that said respondents and all persons claiming under them subsequent to the execution of said mortgage upon said premises, either as purchasers, incumbrancers or otherwise, may be barred and forever foreclosed of all rights or claims or equity of redemption in and to the said premises; that complainant may be allowed to become a purchaser at such sale; and for such other, further, and different relief as may be just and equitable.

(Signed) ELLEN ALBERTINA POLYBLANK,
Known as Sister Albertina, Complainant.

Dated: Honolulu, Sept. 26, 1904.

(Signed) E. A. DOUTHITT,
Attorney for Complainant.

TERRITORY OF HAWAII, *Island of Oahu, ss:*

Ellen Albertina Polyblank, otherwise known as Sister Albertina, being first duly sworn, deposes and says: I am the complainant named in the foregoing Bill of Complaint. I have read the same

and know the contents thereof, and the same is true of my own knowledge.

(Signed) ELLEN ALBERTINA POLYBLANK,
Known as Sister Albertina.

Subscribed and sworn to before me this 26th day of Sept. 1904.

(Signed) EDGAR HENRIQUES,
[SEAL.] *Notary Public, First Judicial Circuit, Territory of Hawaii.*

11 EXHIBIT "A."

Deed.

S. K. Cockett
to
S. Albertina, Trustee.

Stamped $2.00.

Know all men by these presents that I, Stella Keomailani Cockett, wife of James D. Cockett (said James D. Cockett joining in this deed in token of his consent thereto and release of all claim to said lands) of Honolulu, Island of Oahu, Hawaiian Islands, party of the first part in consideration of One Dollar ($1) to me paid by Sister Albertina, of St. Andrews Priory, Honolulu, Island of Oahu, Trustee for Stella Keomailani Cockett, party of the second part, the receipt whereof is acknowledged, do hereby grant, bargain, sell and convey to her, the said Sister Albertina, Trustee, all that lot of land in Pauoa, Honolulu, Island of Oahu, being that portion of Land Commission Award No. 7260 to Namakea situate on the makai side of the road leading Southeasterly from Nuuanu Street to Pauoa Valley, being the same premises referred to in the will of B. Namakea, Probate No. 936, Supreme Court of the —.

Also a certain lot in Honuokaha being the ili of Kaalaa in Honolulu, Island of Oahu, described in Mahele Award No. 61, Royal Patent 7429 to B. Namakeha, and also referred to in the will of the said B. Namakeha. To have and to Hold the same with all the privileges and appurtenances to the same belonging to her, the said Sister Albertina, and her successors and assigns forever, but in trust nevertheless as follows: During the life of Stella Keomailani Cockett, wife of James D. Cockett, of Honolulu, to pay over to her the net rents and profits thereof, or at her election to allow her the said Stella K. Cockett to occupy and enjoy the said estate, she paying the taxes and all necessary charges and expenses (and at her
12 death to convey the said estate to her heirs at law); but the said trustee or any successors in said trust, may in her discretion, at any time upon the request in writing of said Stella Keomailani Cockett, sell and convey the said estate, free from the trusts hereby created, holding the proceeds of such sale upon the same trusts as are herein expressed regarding the estate hereby conveyed,

and any purchaser of said estate at any such sale, shall not be answerable for the application of the purchase money, or for the lack of any written request of sale; but the said trustee, or any successor in said trust may, at any time, in her discretion convey and transfer the estate hereby conveyed, or the proceeds thereof, if sold, to the said Stella K. Cockett and the trust hereby created shall thereby be wholly determined, and the Trustee wholly discharged and released therefrom. And I James D. Cockett, husband of said Stella K. Cockett, for and in consideration of the sum of One Dollar (L) do hereby release and quitclaim unto the said Sister Albertina, Trustee, all right or claim present or prospective which — may or can have in and to the premises above named. And I, Sister Albertina, above named *to* hereby accept this trust.

In Witness Whereof, we, the said Stella Keomailani Cockett, James D. Cockett, her husband, and Sister Albertina have hereunto set our hands and seals the day and year first above written.

(S'g.) STELLA K. COCKETT. [SEAL.]
(S'g.) J. D. COCKETT. [SEAL.]
(S'g.) SISTER ALBERTINA. [SEAL.]

HAWAIIAN ISLANDS, *Island of Oahu, ss:*

On this 19th day of October, A. D. 1899, personally ap-
13 peared before me J. D. Cockett and Stella K. Cockett, his wife, known to me to be the persons described in and who executed the foregoing instrument and they severally acknowledged to me that they executed the same freely and voluntarily and for the uses and purposes therein set forth. And said Stella K. Cockett, wife of said J. D. Cockett, on an examination separate and apart from the said husband acknowledged to me that she executed the same freely, without fear or compulsion of her said husband.

[SEAL.] (S'g.) WILLIAM A. HENSHALL,
Notary Public, First Judicial Circuit.

HAWAIIAN ISLANDS, *Island of Oahu, ss:*

On this 19th day of October, A. D. 1899, personally appeared before me Sister Albertina — satisfactorily proved to me to be the person described in and who executed the foregoing instrument by the oath of C. F. Peterson, a credible witness for that purpose to me known and by me duly sworn, and the said Sister Albertina acknowledged to me that she executed the same freely and voluntarily and for the uses and purposes therein set forth.

(S'g.) WILLIAM A. HENSHALL,
[SEAL.] *Notary Public, First Judicial Circuit.*

14 EXHIBIT "B."

Deed.

S. K. Cockett & Husband, by Trustee,
to
D. Kawananakoa *et al.*

U. S. Rev. Stamps $4.75.
Stamped $48.00.

Know all men by these presents that we, Ellen Albertina Polyblank, otherwise known as Sister Albertina, Trustee for Stella K. Cockett, under Deed of Trust dated October 19th, A. D. 1899, which Deed of Trust is duly placed for record with these presents in the Office of the Registrar of Conveyances, and the said Stella K. Cockett, in her own right, and James D. Cockett, her husband, joining herein, in token of his consent hereto, all of Honolulu, Island of Oahu, Territory of Hawaii, for and in consideration of the sum of Eleven Thousand Eight Hundred and Thirty Two Dollars ($11,832.00) to us paid by David Kawananakoa and Jonah Kalanianaole, both of said Honolulu, the receipt whereof is hereby acknowledged, do hereby remise, release and forever quitclaim unto the said David Kawananakoa and Jonah Kalanianaole, and their heirs and assigns forever, all that portion of the land described in Royal Patent No. 4371, L. C. A. 7260, to B. Namakeha, included within the following metes and bounds, to wit:

Beginning at the East corner of Grant 2363 on the Waikiki side of Nuuanu Avenue, the same being the West corner of the proposed new extension of Kuakini Street and Nuuanu Avenue, and running as follows by true bearings:

N. 41 15′ E., 375.0 feet along Nuuanu Avenue;
S. 84 20′ E., 283.7 " " Pauoa Road;
N. 89 44′ E., 134.5 " " same;
N. 82 32′ E., 180.6 " " "
S. 21 12′ E., 265.0 " " Ulu's place;
S. 58 10′ W., 216.5 " " L. C. A. 85 F. L. and 6059;
S. 56 15′ W., 125.0 " " L. C. A. 236;
S. 62 05′ W., 82.6 " " same;
S. 74 10′ W., 107.5 " " "
N. 7 05′ W., 10.0 " " L. C. A. 1144, Apana 2;

15

S. 86 35′ W., 52.5 " " same;
N. 32 20′ W., 70.0 " " "
S. 45 30′ W., 61.0 " " "
N. 41 20′ W., 161.5 " " "
S. 45 55′ W., 92.0 feet along same and L. C. A. 7675;
N. 49 15′ W., 215.0 " " Grant 2363 to the initial point, and containing an area of 316,284 square feet or 7 26/100 acres, more or less.

Excepting and reserving unto said Grantors all remaining portions of the land described in said Award and also the lele of the ili of Kaalaa, which is covered by Mahele Award No. 61, Royal Patent No. 7429, the title of said lele now being litigated in a suit pending in the Supreme Court of the Territory of Hawaii aforesaid.

To have and to hold the above remised premises, together with all the rights, easements, privileges and appurtenances thereunto belonging, and all the right, title and interest of us and each of us in and to all back rents, issues and profits thereof, unto said David Kawananakoa and Jonah Kalaniānaole, and their heirs and assigns forever.

And for the consideration aforesaid, we and each of us do hereby irrevocably appoint said David Kawananakoa and Jonah Kalaniānaole the attorneys-in-fact of us and each of us and in our names and in the names of each of us or in their own names as they see fit, to ask, demand, sue for and recover all back rents, issues and profits that may be due and owing on said remised premises, and to give valid receipts therefor, and to do and perform all things and execute and deliver all documents and papers necessary or proper to effectuate the premises.

In witness whereof, we, the said Ellen Albertina Polyblank Trustee as aforesaid, and Stella K. Cockett and James D. Cockett, have hereunto set our hands and seals this 8th day of May, A. D. 1902.

16 (S'g'd) ELLEN ALBERTINA POLYBLANK, [L. S.]
Otherwise Known as Sister Albertina,
Trustee for Stella K. Cockett.
" STELLA K. COCKETT. [L. S.]
" J. D. COCKETT. [L. S.]

Signed, sealed, executed and delivered in the presence of
EDMUND H. HART.

UNITED STATES OF AMERICA,
Territory of Hawaii, Island of Oahu, ss:

On this eighth day of May, A. D. 1902, personally appeared before me Ellen Albertina Polyblank, otherwise known as Sister Albertina, Trustee for Stella K. Cockett, and Stella K. Cockett, and J. D. Cockett, her husband, all known to me to be the persons described in and who executed the foregoing instrument and they severally acknowledged to me that they executed the same freely and voluntarily and for the uses and purposes therein set forth. And said Stella K. Cockett on a private examination by me, had separate and apart from her said husband, further acknowledged to me that she executed the same freely and without fear, compulsion or constraint of her said husband.

(S'g'd) EDMUND H. HART, [SEAL.]
Notary Public, First Judicial Circuit.

Recorded May 8th, A. D. 1902, at 3:01 P. M.

17 EXHIBIT "C."

Stamped $15.00.

Know all men by these presents, that we, David Kawananakoa and Jonah Kalanianaole, both of Honolulu, Island of Oahu, Territory of Hawaii, hereinafter designated the Mortgagors, for and in consideration of the sum of Eight Thousand Dollars, ($8,000.00), to us in hand paid Ellen Albertina Pollyblank, of said Honolulu, otherwise known as Sister Albertina, Trustee for Stella K. Cockett, of said Honolulu, hereinafter designated the Mortgagee, the receipt whereof is hereby acknowledged, do hereby give, grant, bargain, sell and convey unto said Mortgagee, and her heirs, successors in trust and assigns forever, all that land situate at Kaalaaluna, in said Honolulu, being a portion of the land described in Royal Patent No. 4371, L. C. A. 7260 to B. Namakeha and conveyed in deed from Sister Albertina, Trustee as aforesaid and said Stella K. Cockett and James D. Cockett, her husband, to said Mortgagors, dated this day and executed concurrent herewith, and duly placed for record with these presents in the Office of the Registrar of Conveyances, in said Honolulu.

To have and to hold the above granted premises, together with all the rights, easements, privileges and appurtenances thereunto belonging, unto the said Mortgagee, and her heirs, successors in trust and assigns forever.

And for the consideration aforesaid, we, Abigail W. Kawananakoa, wife of said David Kawananakoa, and Elizabeth K. Kalanianaole, wife of said Jonah Kalanianaole, do hereby severally release unto said Mortgagee, and her heirs, successors in trust and assigns forever, all right or possibility of Dower in and to the said granted premises.

Provided Nevertheless, that if we, or our heirs, executors, administrators or assigns, shall pay unto the said Mortgagee, or her
18 heirs, executors, administrators, successors in trust or assigns, the sum of Eight Thousand Dollars ($8000.00) in One Year from this date, with interest semi-annually at the rate of seven per cent. per annum, and until such payment shall pay all taxes and assessments to whomsoever laid or assessed, whether on the granted premises or any interest therein or on the debt secured thereby, then this deed, as also a note of even date herewith signed by us, whereby we jointly and severally promise to pay to the said Mortgagee, or order, the said sum and interest at the times aforesaid, shall be void.

But upon any default in the performance or observance of the foregoing condition, the said Mortgagee, her heirs, successors in trust or assigns, may sell the granted premises or any portion thereof, together with all improvements that may be thereon, at Public Auction, according to the provisions of the laws of the Territory of Hawaii providing for the sale of mortgaged property without suit or foreclosure proceedings, and may convey the premises so sold by proper deed or deeds to the purchaser or purchasers absolutely and in fee simple, and such sale shall forever bar us and all persons

claiming under us from all right and interest in the said premises, whether at law or in equity, and out of the money arising from such sale, the said Mortgagee, or her representatives shall be entitled to retain all sums then secured by this deed, including all costs, charges and expenses, and a reasonable attorney's fee, incurred or sustained by them by reason of any default in the performance or observance of said conditions, rendering the surplus, if any, to us or our heirs or assigns.

And we hereby, for ourselves and our heirs and assigns, covenant with the said Mortgagee, and her heirs, executors, administrators, successors in trust, and assigns, that in case a sale shall be
19 made under the foregoing power, we or they will upon request, execute, acknowledge and deliver to the purchaser or purchasers a deed or deeds of release confirming such sale.

This Mortgage is given as part of the purchase price of the property conveyed by said deed hereinbefore mentioned of said Sister Albertina, Trustee, and Stella K. Cockett and James D. Cockett, her husband, to said Mortgagors herein.

In witness whereof, we, the said David Kawananakoa and Abigail W. Kawananakoa, his wife, and Jonah Kalanianaole and Elizabeth K. Kalanianaole, his wife, have hereunto set our hands and seals, this 8th day of May, A. D. 1902.

(S'g'd) D. KAWANANAKOA. [L. S.]
" ABIGAIL W. KAWANANAKOA. [L. S.]
" J. KALANIANAOLE. [L. S.]
" ELIZABETH K. KALANIANAOLE. [L. S.]

Signed, Sealed, Executed and Delivered in presence of
(S'g'd) C. A. LONG.

TERRITORY OF HAWAII, *Island of Oahu, ss:*

On this 8th day of May, A. D. 1902, personally appeared before me D. Kawananakoa and Abigail W. Kawananakoa, his wife, and Jonah Kalanianaole and Elizabeth K. Kalanianaole, his wife, all known to me to be the persons described in and who executed the foregoing instrument, who severally acknowledged to me that they executed the same freely and voluntarily and for the uses and purposes therein set forth.

And said Abigail W. Kawananakoa and Elizabeth K. Kalanianaole on a private examination had by me separate and apart, from their said husbands further acknowledged to me that they executed the same freely and without fear, compulsion or constraint of their said husbands.

(S'g'd) CARLOS A. LONG,
[NOTARIAL SEAL.] *Notary Public, First Judicial Circuit.*

20 Endorsed: In the Circuit Court, First Circuit, Territory of Hawaii. Ellen Albertina Polyblank, etc., *vs.* David Kawananakoa *et al.* Bill of Complaint. Received 37.00 Filed Sept. 26, 1904. George Lucas, Clerk.

21 In the Circuit Court of the First Circuit, Territory of Hawaii, at Chambers.

(Stamps, $2.00.)

ELLEN ALBERTINA POLYBLANK, Otherwise Known as SISTER ALBERTINA, Trustee for Stella Keomailani Cockett,

v.

DAVID KAWANANAKOA, JONAH KALANIANAOLE, ABIGAIL W. KAWANANAKOA, ELIZABETH K. KALANIANAOLE, THE GERMAN SAVINGS AND LOAN SOCIETY OF SAN FRANCISCO, a Corporation, and THE TERRITORY OF HAWAII.

Chambers Summons.

The Territory of Hawaii to the High Sheriff of the Territory of Hawaii or his Deputy, the Sheriff of the Island of Oahu or his Deputy:

You are commanded to summon David Kawananakoa, Jonah Kalanianaole, Abigail W. Kawananakoa, Elizabeth K. Kalanianaole, The German Savings and Loan Society of San Francisco, a corporation, and the Territory of Hawaii to appear ten days after service hereof, if they reside on the Island of Oahu otherwise twenty days after service, before such Judge of the Circuit Court of the First Circuit as shall be sitting at Chambers in the Court Room at Honolulu, Island of Oahu, Territory of Hawaii to answer the annexed Bill of Complaint of Ellen Albertina Polyblank, otherwise known as Sister Albertina.

And you are further commanded, by order of Hon. —— ——, Judge of the Circuit Court of the — Circuit.

And have you then there this Writ with full return of your
22 proceedings thereon.

Witness the First Judge of the Circuit Court of the First Circuit at Honolulu this 26th day of September 1904.

[SEAL.] (Signed) GEORGE LUCAS, *Clerk.*

§ 1278, Civil Laws. The time within — an act is to be done * * * shall be computed by excluding the first day and including the last. If the last day be Sunday, it shall be excluded.

Endorsed: E. 1431. Circuit Court First Circuit. Ellen Albertina Polyblank etc. *v.* David Kawananakoa, *et al.* Chambers Summons and Complaint. Issued at 2-15 o'clock P. M. Sept. 26, 1904. George Lucas, Clerk. Returned at 3 o'clock P. M., October 10, 1904. J. A. Thompson, Clerk. Service at $1.00 each, $—. Cop. at $1.50 each, $—. Expense, —. Total, $—. E. A. Douthitt, Att'y for Complainant, Campbell Building, Honolulu, H. T. Served this Summons as follows: On Jonah Kalanianaole Elizabeth K. Kalanianaole and on the Territory of Hawaii, through Lorrin Andrews as the Attorney

General of the Territory of Hawaii, all of Honolulu, Oahu, at Honolulu, Oahu, this 3rd day of October, A. D. 1904. On David Kawananakoa, Abigail Kawananakoa and on the Territory of Hawaii through Charles F. Chilingworth Dep't. Sheriff of the Territory of Hawaii, at Waimea Hawaii this 5th day of Oct. A. D. 1904 by delivering to each of them a certified copy hereof, and of the Petition hereto annexed, and at the same time showing each of them the original as directed. Dated October 3rd, 1904. Albert McGurn, Deputy Sheriff, W. M. S. Lindsey Dep't. Sheriff. Served the within Summons and Petition on the within named The German Savings and Loan Society of San Francisco, through W. O. Smith, as a person upon whom legal process may be served, by delivering to said W. O. Smith certified copies thereof at Honolulu, Oahu, this 3rd day of October, A. D. 1904, and at the same time showing him the original as directed. Dated Honolulu, Oahu, October 3rd, A. D. 1904. Albert McGurn Deputy Sheriff, Territory of Hawaii. High Sheriff's Office Honolulu, H. T. Served the within Summons as follows: On the within named David Kawananakoa and Abigail W. Kawananakoa, at Waimea, District of South Kohala, Island and Territory of Hawaii, on the 5th day of October, A. D. 1904, by delivering to each of them a certified copy thereof, and of the petition thereto annexed and at the same time showing each of them the original. W. M. S. Lindsey, Deputy Sheriff, South Kohala, Island of Hawaii.

23 In the Circuit Court for the First Circuit, Territory of Hawaii, at Chambers. In Equity.

ELLEN ALBERTINA POLYBLANK, Otherwise Known as SISTER ALBERTINA, Trustee for Stella Keomailani Cockett, Complainant,

vs.

DAVID KAWANANAKOA, JONAH KALANIANAOLE, ABIGAIL W. KAWANANAKOA, ELIZABETH K. KALANIANAOLE, THE GERMAN SAVINGS AND LOAN SOCIETY OF SAN FRANCISCO, a Corporation, and THE TERRITORY OF HAWAII, Respondents.

Bill for Foreclosure of Mortgage.

Plea of Defendants David Kawananakoa, Jonah Kalanianaole, Abigail W. Kawananakoa, and Elizabeth K. Kalanianaole.

These defendants not hereby confessing all or any of the matters alleged in the Bill of Complaint herein to be true, in manner as the same are therein alleged and set forth; and not hereby waiving, their, or either of their Demurrers, or causes of demurrer to said Bill of Complaint, as heretofore submitted to the court in this cause, but insisting thereon, for a Plea to said Bill of Complaint do allege and submit as follows, that is to say:

1. That on or about the 10th day of September, 1903, and subsequent to the date alleged in said Bill of Complaint as the date on which the promissory note, and the mortgage therein mentioned, and

set forth by Exhibit, were executed, these defendants executed
24 and delivered to Samuel M. Damon, of the City of Honolulu, a certain Deed of Conveyance of and concerning a portion of the premises mentioned and described in said Bill of Complaint, and in the mortgage therein alleged to have been executed, and thereto attached by Exhibit, a copy of which said Deed of Conveyance is hereto annexed, Marked Exhibit "A" and made a part of this Plea.

2. That thereafter, to-wit, on the 7th day of November, 1903, said Samuel M. Damon executed and delivered to The Territory of Hawaii, a certain Deed of Conveyance wherein and whereby he, the said Samuel M. Damon did convey to said Territory of Hawaii, certain of the land and premises included in and covered and affected by the mortgage so alleged in said Bill of Complaint to have been executed by these defendants, to said plaintiff, Sister Albertina, as Trustee for said plaintiff Stella Keomailani Cockett, to-wit, the land and premises which had been theretofore so conveyed by these defendants to said Samuel M. Damon as aforesaid.

3. That said land and premises so conveyed as aforesaid to said Samuel M. Damon, and by said Samuel M. Damon so as aforesaid conveyed to said Territory, is and are now owned by The Territory of Hawaii, in its political and public capacity, and is and are now in the possession of The Territory of Hawaii, and of the Executive Officers of said Territory, to-wit, the Superintendent of Public Works of said Territory, and said land and premises so conveyed as aforesaid has and have been and is and are now included in and used as a part of certain of the public streets and highways within the City and District of Honolulu, to-wit, of a certain street and highway commonly called by the name of Pauoa Road.

4. That the interests and equities of all persons concerned in and under the mortgage aforesaid cannot be adjusted and deter-
25 mined by this Honorable Court, in that it is beyond the power and jurisdiction of this Honorable Court to make or render such decree in this cause as will or can subject that portion of said mortgaged land and premises which has been so conveyed by these defendants to said Samuel M. Damon, and has been so conveyed by said Samuel M. Damon to said Territory, to sale in satisfaction of the lien of said mortgage, as the same is, in and by said Bill of Complaint, alleged to exist; and that it is beyond the authority and jurisdiction of this Honorable Court to subject the portion of said mortgaged land and premises so conveyed as aforesaid, to its proportionate share, or to any share of the lien or incumbrance of said mortgage; and that it is beyond the authority and jurisdiction of this Honorable Court to decree the delivery of the possession of said portion of said mortgaged land and premises so conveyed as aforesaid, from and out of the possession of said Territory; or (and) of its said Executive Officer, the Superintendent of Public Works aforesaid.

5. And these defendants submit that they have a right to insist that the matters alleged and set forth in said Bill of Complaint shall be determined and adjudicated, (if at all) in and before a court possessing full and ample jurisdiction of all the parties in interest, and full and ample authority and jurisdiction to deal with all and singu-

lar the premises mentioned, described and conveyed in and by the mortgage mentioned in said Bill of Complaint; and having full and ample authority and jurisdiction to dispose of all and singular the premises so mortgaged, and to subject the same to the lien, (if any) of said mortgage, and to decree and enforce its decree for the sale, and for the delivery of possession of all and singular the land, property, and premises mentioned, described, conveyed and included in and by the mortgage in said Bill of Complaint mentioned,
26 in the event that a sale of said property or any thereof, shall be ordered and adjudged in and by the final decree herein.

Wherefore these defendants respectfully submit that this Honorable Court hath no jurisdiction to grant the relief prayed in said Bill of Complaint, and, for lack of such authority and jurisdiction as aforesaid, should not proceed further in the hearing or determination of the cause, matters and things alleged in said Bill of Complaint.

And these defendants respectively, humbly submit and pray judgment of the court here, whether they, or any of them should be obliged to make any other or further answer to the matters and things alleged and set forth in said Bill of Complaint; and they further pray that they may be hence dismissed, without day, together with their reasonable costs in this behalf sustained.

Dated this 28th day of November, 1904.

DAVID KAWANANAKOA,
JONAH KALANIANOLE,
ABIGAIL W. KAWANANAKOA,
ELIZABETH K. KALANIANAOLE,
Defendants,

(Signed) By C. W. ASHFORD, *Their Attorney.*

TERRITORY OF HAWAII, *Island of Oahu, ss:*

C. W. Ashford having been duly sworn, deposes and says:

That he is the Attorney of Record for the above named defendants, David Kawananakoa, Jonah Kalanianaole, Abigail W. Kawananakoa and Elizabeth K. Kalanianaole whose Plea in the above entitled cause precedes this jurat. That Deponent is familiar with all of the facts and circumstances set forth in said Plea, and here verifies the same on behalf of said defendants, and each of them; and that the matters and things alleged in said Plea are true, within the knowledge of this Deponent.

(Signed) C. W. ASHFORD.

Sworn to before me this 28th day of November, 1904.

(Signed) M. T. SIMONTON,
Clerk of the Circuit Court, First Circuit, Territory of Hawaii.

27 EXHIBIT "A."

Deed.

David Kawananakoa
to
Samuel M. Damon.

Stamped $6.00.

This Indenture made this 10th day of September, A. D., 1903, by and between David Kawananakoa and Jonah Kalanianaole, hereinafter named the Grantors, (which expression shall include their respective heirs, executors, administrators, and assigns,) parties of the first part, and Samuel M. Damon, hereinafter named the Grantee, party of the second part, all of Honolulu, Island of Oahu, Territory of Hawaii,

Witnesseth:—

The said Grantors for and in consideration of the sum of Twelve Hundred Ninety and 70/100 Dollars, ($1290.70) to them in hand paid by said Grantee, the receipt whereof is hereby acknowledged, have and each of them has bargained and sold, and do and each of them does hereby grant, convey, remise, release and confirm unto said Grantee, his heirs, and assigns all and singular those certain lands and premises situated at Kaalaaluna, Pauoa, contained in Royal Patent No. 4371 L. C. A. 7260 to B. Namakeha, and which said premises hereby granted consist of four separate pieces or parcels which are respectively and more particularly described by metes and bounds in the schedule hereto attached and made a part of this Conveyance.

To have and to hold the above described and granted premises together with all and singular the tenements, hereditaments, and appurtenances thereon standing, or thereunto in anywise belonging or appertaining unto said Grantee, and his heirs and assigns forever.

And for the consideration aforesaid, the above named Grantors do, and each of them does hereby covenant and agree to and
28 with the said Grantee, and his heirs and assigns that they the Grantors aforesaid are legally seized of the premises above described and conveyed in fee simple; that they have good and legal right to sell and convey the same, and that they will, and their respective heirs, executors and administrators shall well and truly warrant and defend the title thereto in said Grantee; and his heirs and assigns against the lawful claim or claims of any and all persons whomsoever.

And Abigail W. Kawananakoa, wife of said David Kawananakoa, in consideration of One Dollar, ($1.00) to her paid by said Grantee, the receipt whereof is hereby acknowledged, does hereby release and quitclaim to the said Grantee all of her right or possibility of dower in and to the said granted premises.

And Elizabeth K. Kalanianaole, wife of said Jonah Kalanianaole

in consideration of One Dollar ($1.00) to her paid by said Grantee, the receipt whereof is hereby acknowledged, does hereby release and quitclaim to the said Grantee all of her right or possibility of dower in and to said granted premises.

In witness whereof said Grantors and their said wives have hereunto set their hands and seals the day and year first above written.

(Sig.) DAVID KAWANANAKOA.
JONAH KALANIANAOLE.
ABIGAIL W. KAWANANAKOA.
ELIZABETH K. KALANIANAOLE.

Executed in presence of

(Sig.) EDMUND H. HART.

29 *Schedule Hereinabove Referred to.*

First: Beginning at a point on the fence separating T. Olivero property from that of the Kapiolani Estate, Limited, which point bears S. 89° 59′ 30″ E. distance 193.5 feet, from the intersection of Nuuanu Avenue with the new South line of Pauoa Road as shown on Government Survey Registered Map No. 2004, and running by true bearings:

S. 89° 59′ 30″ E. 122.2 feet along new South Line of Pauoa Road to fence corner;
N. 84° 52′ W. 121.2 feet along Old South line of Pauoa Road to old fence corner;
S. 7° 40′ W. 11.1 feet along fence to point of beginning.
Area 660 Square Feet.

Second: Beginning at a point on the new South line of Pauoa Road S. 89° 59′ 30″ E., 446.5 feet from the intersection of the new South line of Pauoa Road and Nuuanu Avenue, as shown on Government Survey Registered Map No. 2004 and running by true bearings:

S. 89° 59′ 30″ E. 187.8 feet along new South line of Pauoa Road;
N. 20° 55′ W. 24.0 feet along fence;
S. 83° 00′ W. 180.8 feet along present South line of Pauoa Road to point of beginning.
Area 2088 Square Feet.

Third: Beginning at a point on the new South line of Pauoa Road S. 89° 59′ 30″ E. 634.3 feet from the intersection of the new South line of Pauoa Road and Nuuanu Avenue as shown on Government Survey Registered Map No. 2004 and running by true bearings:

S. 89° 59′ 30″ E. 72.2 feet along new South line of Pauoa Road. Thence along a curve to the right direct bearing and distance being

S. 75° 8′ E. 38 feet,
S. 62° 00′ E. 55.4 feet along new South line of Pauoa Road;
N. 21° 25′ E. 14.7 feet along fence,
N. 58° 27′ W. 71.5 feet to fence corner;
N. 69° 50′ W. 7.6 feet along Old South line of Pauoa Road;
N. 80° 30′ W. 44.8 feet along Old South line of Pauoa Road;
N. 85° 32′ W. 24.2 feet along Old South line of Pauoa Road;
S. 82° 3′ W. 36.2 feet along Old South line of Pauoa Road;
S. 20° 55′ E. 24.0 feet along fence to point of beginning.
Area 3656 Square Feet.

30 Fourth: Beginning at a point where the new South Line of Pauoa Road intersects the North-west Boundary of L. C. A. 11 F. L. to Kapule, said point being opposite Booth Road, as shown on Government Survey Registered Map No. 2004 and running by true bearings:

N. 38° 31′ E. 8.6 feet along center of stone wall;
N. 59° 40′ W. 156.0 feet along present street line;
S. 21° 25′ E. 14.7 feet along fence;
S. 62° 00′ E. 152.8 feet along new South line of Pauoa Road to point of Beginning.
Area 1771 Square Feet.

(Signed) DAVID KAWANANAKOA.
" JONAH KALANIANAOLE.

Endorsed: E. 1431. Circuit Court, First Circuit. Territory of Hawaii. At Chambers. In Equity. Ellen Albertina Polyblank, otherwise known as Sister Albertina, Trustee for Stella Keomailani Cockett, *vs.* David Kawananakoa, *et al.* Respondents. Plea of Defendants David Kawananakoa, Jonah Kalanianole, Abigail W. Kawananakoa and Elizabeth K. Kalanianaole. Filed November 28, 1904 at 9 o'clock A. M. M. T. Simonton, Clerk. Clarence W. Ashford, Attorney for Defendants.

In the Circuit Court of the First Circuit, Territory of Hawaii, at Chambers. In Equity.

Before Robinson, J.

ELLEN ALBERTINA POLYBLANK (Otherwise Known as SISTER ALBERTINA), Trustee for Stella Keomailani Cockett, Complainant,

vs.

DAVID KAWANANAKOA, JONAH KALANIANAOLE, ABIGAIL W. KAWANANAKOA, ELIZABETH K. KALANIANAOLE, THE GERMAN SAVINGS AND LOAN SOCIETY OF SAN FRANCISCO, a Corporation, and THE TERRITORY OF HAWAII, Respondents.

Bill for Foreclosure of Mortgage.

Answer of The German Savings and Loan Society, a Corporation.

Now comes The German Savings and Loan Society, one of the defendants in the above entitled action, improperly impleaded herein as The German Savings and Loan Society of San Francisco, and not hereby waiving the many irregularities and insufficiencies in said Complainant's Bill of Complaint contained, for answer thereunto, or to so much thereof as it is advised it is necessary or material to answer, does hereby admit, deny and allege as follows:

I.

It alleges that The German Savings and Loan Society is a corporation organized and existing under and by virtue of the laws of the State of California, and also doing business at Honolulu, Island of Oahu, and elsewhere in the Territory of Hawaii; and this respondent denies that its name is The German Savings and Loan Society
32 of San Francisco, as impleaded in Paragraph I of said Bill, and in the entitlement of said cause, and in Paragraph XII of said Bill.

II.

It alleges that it has no information or knowledge sufficient to enable it to form a belief concerning, or to answer the allegations in said Bill contained and set forth in Paragraphs II, III, IV, V, VI, VII, VIII, IX, X, XI, XIII, XIV, and XV, of said Bill, and, therefore, neither admits nor denies the same, but leaves said Complainant to her proof thereof.

III.

Answering the allegations of Paragraphs XII of said Bill, this respondent admits and alleges that it has and claims a right and interest in the property described and referred to in Paragraph IV of said Bill; and further answering herein in this behalf alleges that on the

31st day of May 1903, the said respondents David Kawananakoa, Jonah Kalanianaole, Abigail W. Kawananakoa and Elizabeth K. Kalanianaole did make, execute and deliver to this respondent a certain Indenture of Mortgage wherein and whereby said respondents did grant, bargain, sell and convey unto this respondent, by way of Mortgage, 1-95/100 acres of the land of Royal Patent 4371, Land Commission Award 7260, to B. Namakeha, the same being a portion of the premises described in said Paragraph IV of said Bill, said mortgage being now recorded in the office of the Registrar of Conveyances in said Honolulu in Liber 237 on pages 133 to 140, said mortgage having been so made and given by way of further security for the repayment to this respondent by the Kapiolani Estate, Limited, of the sum of Three Hundred Thousand Dollars ($300,000.), as will more fully appear in said Indenture of Mortgage, reference whereto is hereby made, and the same made a part hereof.

33 IV.

That the said 1-95/100 acres of land of said Royal Patent 4371 Land Commission Award 7260, to B. Namakeha, referred to in Paragraph III of this Answer, are particularly described as follows:—

All that portion of Royal Patent No. 4371, L. C. A. 7260, to B. Namakeha, at Kaalaa, Pauoa, Honolulu, Oahu, bounded and described as follows:—

Beginning at the West corner of this land on Pauoa Road, the same being the North corner of L. C. A. 5957 B. Apana 3 to Kaholoau, and running by true meridian:

S. 84° 50′ E. 107.4 feet along Pauoa Road;
S. 88° 40′ E. 54.0 feet along same;
N. 88° 30′ E. 80.5 feet along same;
S. 24° 45′ E. 52.0 feet along fence;
N. 54° 20′ W. 13.0 feet along same;
S. 00° 55′ E. 222.3 feet along same;
S. 5° 00′ E. 103.0 feet along same;
S. 55° 18′ W. 23.0 feet along L. C. A. 236 to Kaholo;
N. 5° 05′ W. 36.0 feet along remainder of this land;
S. 84° 12′ W. 180.8 feet along stone wall;
N. 12° 07′ E. 183.0 feet along L. C. A. 5957 B. Apana 4 to Kaholoau;
N. 70° 35′ W. 125.0 feet along same;
N. 9° 20′ E. 171.5 feet along L. C. A. 5957 B. Apana 3 to Kaholoau to the initial point, and containing an area of 1.95/100 acres.

Wherefore, this respondent prays that if after due hearing and adduction of proofs, it shall appear to this Court that the Complainant herein has and holds a first lien and charge upon the property
34 in the fourth paragraph of said Bill described, and that said respondents David Kawananakoa and Jonah Kalanianaole are indebted to said petitioner as in her Bill set forth, and if said

Court shall direct a sale of the mortgaged property according to the prayer in said Bill contained, that the same be not sold as a whole, but that the said 1 95/100 acres hereinabove in Paragraph IV of this mortgage described, be not sold, unless it shall appear that the proceeds of the remaining part of said property shall prove insufficient to pay the amount found to be due said petitioner;

And this respondent further prays that in case such proceeds shall be insufficient to pay in full the sum which may be found due to said petitioner, and it shall be necessary to sell the 1 95/100 acres above described, that all surplus proceeds, if any, which shall remain after the payment of such amount found due said petitioner, shall be paid and delivered to this respondent.

THE GERMAN SAVINGS & LOAN SOCIETY, *Respondent,*

(Signed) By W. O. SMITH, *Its Attorney-in-Fact.*

SMITH & LEWIS,
By LOUIS J. WARREN,
Attorneys for said Respondent.

TERRITORY OF HAWAII, *Island of Oahu, ss:*

William O. Smith of Honolulu, being first duly sworn deposes and says:

That he is the Attorney-in-fact for The German Savings and Loan Society, the respondent whose answer is above set forth, and makes this affidavit on its behalf; that the said answer has been read to him, and he knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein set forth upon information and belief, and as to those matters, he believes it to be true.

(Signed) W. O. SMITH.

Subscribed and sworn to before me this 2nd day of December 1904.

(Signed) WM. J. FORBES,
[SEAL.] *Notary Public, First Judicial Circuit.*

The annexation of a copy of the Indenture of Mortgage referred to in Paragraph III of the foregoing Answer is hereby waived.

(Signed) E. A. DOUTHITT,
Attorney for Complainant.

Endorsed: E. 1431. Circuit Court, First Circuit. At Chambers. In Equity. Before, Robinson, J. Ellen Albertina Polyblank *vs.* David Kawananakoa, *et al.* Answer of Respondent The German Savings and Loan Society. Filed Dec. 3, 1904 at 11:2 A. M. J. A. Thompson, Clerk. Smith & Lewis Attorneys at Law. Judd Building, Honolulu, T. H. Received a copy of the within answer this 3rd day of December, 1904, within the time stipulated wherein within named Respondent might serve and file the same. E. A. Douthitt, Attorney for Petitioner.

36 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii, at Chambers. In Equity.

ELLEN ALBERTINA POLYBLANK, Otherwise Known as SISTER ALBERTINA, Trustee for Stella Keomailani Cockett, and STELLA KEOMAILANI COCKETT, Sole Beneficiary under said Trust, Complainants,

vs.

DAVID KAWANANAKOA, JONAH KALANIANAOLE, ABIGAIL W. KAWANANAKOA, ELIZABETH K. KALANIANAOLE, THE GERMAN SAVINGS AND LOAN SOCIETY, a Corporation, and THE TERRITORY OF HAWAII, Respondents.

Dismissal as to Territory of Hawaii.

Now come the above named plaintiffs by E. A. Douthitt, their attorney, and hereby dismiss, discontinue and abandon their bill of complaint, and right of action thereunder, as to and concerning the respondent, the Territory of Hawaii.

ELLEN ALBERTINA POLYBLANK
ET AL., *Complainants,*

(Signed) By E. A. DOUTHITT, *Their Attorney.*

Endorsed: E. 1431. In the Circuit Court, First Circuit, Territory of Hawaii. In Equity. At Chambers. Ellen Albertina Polyblank *et al., vs.* David Kawananakoa *et al.* Dismissal as to Territory of Hawaii. Filed December 8, 1904. 3:25 P. M. M. T. Simonton, Clerk.

37 In the Circuit Court for the First Circuit, Territory of Hawaii, at Chambers. In Equity.

Equity No. —.

ELLEN ALBERTINA POLYBLANK, Otherwise Known as SISTER ALBERTINA, Trustee for Stella Keomailani Cockett, and STELLA KEOMAILANI COCKETT, Plaintiffs,

vs.

DAVID KAWANANAKOA, JONAH KALANIANAOLE, ABIGAIL W. KAWANANAKOA, ELIZABETH K. KALANIANAOLE, THE GERMAN SAVINGS AND LOAN SOCIETY OF SAN FRANCISCO, a Corporation, and THE TERRITORY OF HAWAII, Defendants.

Bill for Foreclosure of Mortgage.

Amended Answer of Defendants David Kawananakoa, Jonah Kalanianaole, Abigail W. Kawananakoa, and Elizabeth K. Kalanianaole.

The above named defendants David Kawananakoa, Jonah Kalanianaole, Abigail W. Kawananakoa and Elizabeth K. Kalanianaole

not hereby waiving their, or either of their demurrer or demurrers to the bill of complaint herein, or any of the matters or causes of demurrer therein set forth, but insisting thereon; and not hereby waiving their joint plea to said bill of complaint, nor any of the matters or causes in said plea set forth, but insisting thereon, by leave of the Court first obtained, present this, their joint amended answer to said bill of complaint, and, for answer thereto, or to so much and such parts thereof as they are advised it is necessary or material for them to answer unto, they jointly answer as follows:

38 1. They have no knowledge of the corporate character of The German Savings & Loan Society of San Francisco, as alleged in said bill of complaint, and as to such corporate character they leave plaintiffs to their proofs.

2. As to all and singular other the matters alleged in the paragraphs of said bill of complaint numbered respectively I, II, and III, these defendants neither admit nor deny the same, but leave plaintiffs to their proofs thereof.

3. These defendants admit the execution by said plaintiffs and James D. Cockett, on or about May 8, 1902, of the deed, a copy whereof, Marked Exhibit "B," is attached to, and made a part of said bill of complaint. But defendants allege in this behalf, that neither said plaintiff Sister Albertina, as the Trustee of plaintiff Stella Keomailani Cockett, nor said last named plaintiff was or were then the owner or owners of the property which said deed purports to convey, but that on the contrary these defendants David Kawananakoa and Jonah Kalanianaole were then and there the owners in fee simple of a certain portion of the land and premises within the metes and bounds purported to be conveyed by said last mentioned deed to said last mentioned defendants; and that the portion thereof then and there so owned by said last named defendants was, to-wit, a portion of L. C. A. 7260, R. P. 4371 to B. Namakeha, and was and were the same land and premises more particularly described in a certain schedule Marked Exhibit "A," hereto attached and made a part of this answer; and was and were then and there known as the patches or lois of Nakamakaweuweu, and that, at the time of the execution of said last mentioned deed it was well known and conceded by said plaintiffs that said last named defendants were then and there the owners in fee simple of said last mentioned and described patches or lois; and that it was not the intent or purpose of any of the

39 parties to said deed that said plaintiffs or either of them were or was thereby conveying to said last named defendants, or either of them, any part, or portion of said patches or lois of Nakamakaweuweu; but that, on the contrary it was then and there well known and understood by all the parties to said deed that said plaintiffs had not, nor had either of them, any right, title or interest whatsoever in or to said patches or lois of Nakamakaweuweu. And defendants further allege that the reasons which prompted the parties to said deed to include, and have included therein the metes and bounds therein expressed, then and there was the ignorance or doubt of said plaintiffs as to the precise location and identity of said patches or lois of Nakamakaweuweu, and that it was considered and deter-

mined by said parties that the safest and best manner of describing the grant intended to be made by said plaintiffs to said last mentioned defendants, in such manner as to effectually convey all and singular the rights of said plaintiffs, or either of them, in and to that portion of said L. C. A. 7260, was to follow the metes and bounds expressed and set forth in the said deed, notwithstanding the fact, then existing and well known to all the parties to said deed, that considerable areas lying within said metes and bounds, other than said patches or lois of Nakamakaweuweu, were then and there owned by third parties, to wit, Kapiolani Estate, Limited, and the Trustees under the Will of Bernice Pauahi Bishop, and one A. B. Silveira, and in which neither said plaintiffs nor said last named defendants had any right, title or interest whatsoever.

4. That the consideration for said conveyance by said plaintiffs and said James D. Cockett to said last named defendants was then and there the composition and compromise of a certain suit at
40 law which was then pending in the Circuit Court for the First Circuit of the Territory of Hawaii, wherein the plaintiffs herein were the parties-plaintiff, and said defendants David Kawananakoa and Jonah Kalanianaole were the parties-defendant, and also the sum of $11,832.00. That as a part of said transaction said last named defendants paid said plaintiffs the sum of $3832.00 on account of said purchase price, and executed that certain mortgage, attached, by copy, to said bill of complaint as Exhibit "C" thereof.

That it was not the intent or purpose of any of the parties to said transaction, and especially that it was not the intent or purpose of the defendants here answering, or any of said last mentioned defendants, to include within the terms of said last mentioned mortgage, any land or property whatsoever other than the land and property which were, in and by said last mentioned deed conveyed, and, by the parties to said deed intended to be conveyed by said plaintiffs and said James D. Cockett, to said defendants David Kawananakoa and Jonah Kalanianaole; and defendants particularly and expressly allege that it was not then and there their intention, or the intention of any or either of the defendants here answering to include within the terms of said mortgage any land or premises whatsoever which had been, and were then and there owned by the defendants here answering, or any or either of them, and, more particularly, that it was not then or there the intent or purpose of the defendants here answering, or of any or either of them to include, or have included, within the terms of said mortgage, the said patches or lois of Nakamakaweuweu; but that, on the contrary, it was then and there the intent, purpose and understanding, not only of the defendants here answering, but also of said plaintiffs, that said mortgage should cover, include, affect, and apply to only the lands and premises which were then and
41 there conveyed, and intended to be conveyed, to said defendants David Kawananakoa and Jonah Kalanianaole, in and by the deed last herein mentioned; and that it was not then and there the purpose, intent or understanding of any of the parties to said mortgage that said patches or lois of Nakamakaweuweu should be included within the scope or effect of said mortgage.

5. That the defendants here answering executed the mortgage last aforesaid with the understanding, and in the belief that it covered and affected only those lands and premises which had been intended to be conveyed, and were in fact conveyed by said plaintiffs and said James D. Cockett to said defendants David Kawananakoa and Jonah Kalanianaole; and in particular, that the defendants here answering were, at the time of executing, acknowledging and delivering said mortgage, ignorant of the fact that said mortgage, by its terms, included or could be construed to include said patches or lois of Nakamakaweuweu; and that these defendants here answering, at all times since the execution of said mortgage, until, to-wit, the 14th day of February, 1905, supposed and believed that said mortgage did not in fact include, and could not be construed to include said patches or lois last mentioned. And that these defendants for the first time discovered, and became aware and informed of the fact that said mortgage, purports to included and affect said patches or lois of Nakamakaweuweu, on said 14th day of February, 1905, through the medium of their business agent, John F. Colburn Esq., in conference with A. Lewis Jr. Esq., one of the attorneys of defendant The German Savings & Loan Society herein, examining said mortgage, with reference to a certain mortgage later given by the defendants here answering to said defendant The German Savings & Loan Society, of and upon said last named patches or lois, together with certain other property.

42 And that as result of said discovery by said John F. Colburn, the defendants here answering were at once notified, either in person, or through their agents and attorneys of the facts so discovered as aforesaid.

6. And these defendants allege that, had they understood and known that said mortgage in fact included, or could be construed to include within its terms and effect the said patches or lois of Nakamakaweuweu, they would not, nor would any or either of them have executed or delivered the same to said plaintiffs. And they further allege that *that* the inclusion therein of said patches or lois was the result of mistake, and inadvertence on the part of their conveyancers.

7. That, in the absolute belief that said patches or lois were entirely *un*cumbered, or affected by the mortgage last aforesaid, these defendants, on or about the 31st day of May, 1902, executed, acknowledged and delivered, (in conjunction with Kapiolani Estate, Limited,) a mortgage, for the sum of, to wit, $300,000.00, upon said patches or lois of Nakamakaweuweu, together with other lands and premises situate in Honolulu, and elsewhere within this Territory; and that, at the time of the execution of said last mentioned mortgage, said defendant The German Savings & Loan Society was assured by these defendants, and confidently believed, that it was thereby acquiring a first lien upon said patches or lois, and that the same were unincumbered, and utterly unaffected by the mortgage first hereinabove mentioned.

8. As to the matters alleged in paragraph numbered VII of said bill of complaint, these defendants admit that at the time and times

therein mentioned, defendant Abigail W. Kawananakoa was, and she now is the wife of defendant David Kawananakoa; and that defendant Elizabeth K. Kalanianaole then was, and now is the wife of defendant Jonah Kalanianaole; and as to all other matters
43 in said paragraph alleged, they neither admit nor deny the same, but leave plaintiffs to their proofs thereof.

9. But these defendants respectively submit that this Honorable Court has not, nor has the Third Judge of this Honorable Court, nor any Judge of this Honorable Court jurisdiction, while sitting at Chambers, to take cognizance of, or hear, or determine the cause of action, if any there be, set forth in said bill of complaint.

10. And these defendants further allege and submit that there is now a defect of parties to this suit, which said defect is well known to said defendants, and that said defect consists in this, to wit; that these defendants heretofore, to wit, on or about the 10th day of September, 1903, sold and conveyed to one Samuel M. Damon certain portion of the land and premises mentioned in said bill of complaint, and in the Exhibits and Schedules thereto annexed, and which is and are therein alleged to be covered and affected by the mortgage in said bill of complaint recited, a copy of said last mentioned conveyance being annexed to defendants' said plea in this action, now on file herein. That thereafter, to-wit, on the 7th day of November, 1903, said Samuel M. Damon executed and delivered to the Territory of Hawaii, a certain deed of conveyance, wherein and whereby he, the said Samuel M. Damon did convey to said Territory of Hawaii the land and premises described and conveyed in said last mentioned deed; and that said conveyed land and premises, (to-wit, certain portions of the lands affected and covered by the mortgage recited in said Bill of Complaint) are now held and owned by the Territory of Hawaii, and have been and are incorporated in certain of the public highways of the City of Honolulu.

44 11. That on or about the 20th day of January, 1905, all and singular the right, title and interest of said defendant Jonah Kalanianaole in and to the lands mentioned in, and affected by the mortgage herein referred to, was and were sold at public auction in the City of Honolulu, under Judicial process issued from the District Court in and for the District of Honolulu, Island of Oahu; and that at and upon said sale, one Adrian M. Keoho became the purchaser of all and singular the right, title and interest therein of said defendant Jonah Kalanianaole; and that in pursuance of said sale and purchase there was executed and delivered to him, the said Adrian M. Keoho, by the High Sheriff of the Territory of Hawaii, a deed of conveyance of all and singular the right, title and interest so sold and purchased as aforesaid; and that he, the said Adrian M. Keoho has ever since been, and now is the legal owner in fee simple of all and singular the right title and claim interest in said lands and premises theretofore owned and held by said defendant Jonah Kalanianaole; and that he, the said Adrian M. Keoho has ever since been, and now is the owned and holder of all and singular the equity of redemption in and pertaining to said property, which, before the execution of said

last mentioned deed, was owned by and pertained to said defendant Jonah Kalanianaole.

12. And these defendants allege and submit that said Territory of Hawaii, and said Adrian M. Keoho, or (and) any and all other person or persons, if any, by whom the land and premises, or any part or portion thereof so sold, and conveyed as aforesaid, to-wit, as set forth in paragraphs 10 and 11 of this answer, is and are now held and that the question between the plaintiffs and these defendants in the premises cannot be fully and fairly adjudicated without
45 making the present owner and owners of all and singular the lands and interests so conveyed as set forth in said paragraphs 10 and 11 hereof, parties to this suit.

13. And these defendants further submit and allege that it would be inequitable to pronounce a decree in this cause wherein or whereby said lands and premises known as the patches or lois of Nakamakaweuweu should be in anywise subjected to sequestration or sale under the terms of the mortgage herein aforesaid, or for the purpose of answering any obligation of said mortgage; and defendants further submit that, in the event that the Court shall find it consistent with the principles and practice of equity to grant a decree of foreclosure, as prayed in said bill of complaint, as against any land or premises whatsoever, then the said patches or lois of Nakamakaweuweu as the same are described by metes and bounds in said Exhibit "A," hereto attached, should be, by such decree excluded, and exempted from such sale, and further that such decree should declare and adjudge that said patches or lois were not intended, by the parties to said mortgage, to be included within the scope and effect thereof, and that the inclusion thereof within the description of the premises thereby mortgaged was the result of inadvertence and mistake on the part of the conveyancers of the defendants here answering, and that said mortgage should be reformed so as to exclude said patches and lois, or in the alternative, should be so construed as to exclude the same, without such formal reformation.

Wherefore these defendants further submit that no decree should pass against them in the premises, for the foreclosure of said mortgage, or for the sale of the premises, or any portion of the premises in said bill of complaint alleged to be so mortgaged as aforesaid, unless, nor until all and singular the parties in anywise materi-
46 ally interested in said premises, or any thereof, be brought before the Court, to the end that all equities may be settled and adjusted herein.

And wherefore these defendants further pray that if the said plaintiffs shall refuse or decline to make such parties in interest parties to this action, said bill of complaint should be dismissed.

Dated this 15th day of February, 1905.

DAVID KAWANANAKOA,
JONAH KALANIANAOLE,
ABIGAIL W. KAWANANAKOA,
ELIZABETH K. KALANIANAOLE,
Defendants,

(Signed) By C. W. ASHFORD, *Their Attorney.*

TERRITORY OF HAWAII, *Island of Oahu, ss:*

John F. Colburn having been duly sworn, deposes and says: That he is, and at all times during more than three years last past, has been the business agent of the above named defendants David Kawananakoa and Jonah Kalanianaole at and in the City of Honolulu. That deponent has read the foregoing answer of said defendants and their respective wives, to the bill of complaint in this cause, and knows the contents of said answer. That he is, and at all times mentioned in said answer was and has been familiar with the facts therein set forth, in a greater degree than either of said defendants. That as such business agent as aforesaid, he had charge of the preparation of the instruments of conveyance and mortgage in said answer mentioned and referred to, and that the matters alleged as facts in said answer are true of his own knowledge; except those matters which are therein alleged upon information, advice or belief, and as to those matters, he believes them to be true.

(Signed) JOHN F. COLBURN.

Sworn to before me this 16 day of February, 1905.

(Signed) W. S. EDINGS,
[SEAL.] *Notary Public, First Judicial Circuit.*

47 EXHIBIT A.

All that portion of Royal Patent No. 4371, L. C. A. 7260, to B. Namakeha, at Kaalaa, Pauoa, Honolulu, Oahu, bounded and described as follows:—

Beginning at the West corner of this land on Pauoa Road, the same being the North corner of L. C. A. 5957 B. Apana 3 to Kaholoau, and running by true Meridian:

S. 84 50′ E. 107.4 feet along Pauoa *Roda;*
S. 88 40′ E. 54.0 feet along same;
N. 88 30′ E. 80.5 feet along same;
S. 24 45′ E. 52.0 feet along same;
N. 54 20′ W. 13.0 feet along same;
S. 00 55′ E. 222.3 feet along same;
S. 5 00′ E. 103.0 feet along same;
S. 55 18′ W. 23.0 feet along L. C. A. 236 to Kahole;
N. 5 05′ W. 36.0 feet along remainder of this land;
S. 84 12′ W. 180.8 feet along stone wall;
N. 12 07′ E. 183.0 feet along L. C. A. 5957 B. Apana 4 to Kaholoau;
N. 70 35′ W. 125.0 feet along same;
N. 9 20′ E. 171.5 feet along L. C. A. 5957 B. Apana 3 to Kaholoau to the initial point, and containing an area of 1.95/100 Acres.

Endorsed: Equity #1431. R. 1/194. Circuit Court First Circuit. At Chambers. In Equity. Ellen Albertina Polyblank alias Sister

Albertina, Trustee *vs.* David Kawananakoa, *et al.* Amended Answer of Defendants David Kawananakoa, Jonah Kalanianaole, Abigail W. Kawananakoa & Elizabeth K. Kalanianaole. Original. Filed February 16th, 1905, at 3:50 o'clock P. M. M. T. Simonton, Clerk. C. W. Ashford Att'y for above named def'ts.

48 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii, at Chambers. In Equity.

ELLEN ALBERTINA POLYBLANK, Otherwise Known as SISTER ALBERTINA, Trustee for Stella Keomailani Cockett, and STELLA K. COCKETT, Sole Beneficiary under said Trust, Complainants,

vs.

DAVID KAWANANAKOA, JONAH KALANIANAOLE, ABIGAIL W. KAWANANAKOA, ELIZABETH K. KALANIANAOLE, THE GERMAN SAVINGS AND LOAN SOCIETY, a Corporation, and THE TERRITORY OF HAWAII, Respondents.

Decree of Foreclosure.

This cause came on regularly to be heard before the undersigned Third Judge of the Circuit Court of the First Circuit, at Chambers, on the 3rd day of May, A. D. 1905, E. A. Douthitt, Esq. appearing for complainants and C. W. Ashford, Esq. appearing for the respondents, David Kawananakoa, Jonah Kalanianaole, Abigail W. Kawananakoa and Elizabeth K. Kalanianaole, and
W. J. R. Messrs. Smith & Lewis appearing for the German Savings & Loan Society, a corporation, the Territory of Hawaii not appearing, the complainants herein having discontinued and dismissed their bill of complaints as to said Territory of Hawaii.

The Court having heard all of the evidence and proofs produced herein and duly considered the same, and being fully advised in the premises, and it appearing therefrom to the satisfaction of the Court—

1. That the above named respondents have been duly and regularly summoned to appear and answer the complainants' bill
49 of complaint herein;

2. That there is now due and owing to the complainants herein, from the respondents, David Kawananakoa and Jonah Kalanianole, upon the promissory note and mortgage sued upon in this action, the sum of Eight Thousand Dollars, together with interest thereon at the rate of seven per cent. per annum, from the 25th day of June, A. D. 1903, and that the respondents, David Kawananakoa and Jonah Kalanianaole are personally liable for the whole amount thereof;

3. That there is also due the complainants from said respondent-David Kawananakoa and Jonah Kalanianaole the sum
W. J. R. of Forty-four and 50/100 ($44.50) Dollars as and for costs and expenses incurred by complainants herein;

4. That the said sums of Eight Thousand Dollars together with

interest thereon at the rate of seven per cent. per annum from the 25th day of June A. D. 1903, amounting to $9042.10
W. J. R. *Dollars*, together constitute a valid first lien upon the land and premises mentioned in complainants' bill of complaint, and hereinafter particularly set forth and described, and is secured by the mortgage mentioned and set forth in said complaint;

5. That each and all of the terms and conditions of said mortgage have been broken by said respondents David Kawananakoa and Jonah Kalanianaole and that complainants are entitled to have said mortgage enforced and foreclosed and the lands and premises, hereinafter set forth and described sold in the manner prescribed by law, and the proceeds arising from such sale applied to and upon the payment of said sum of money so due as aforesaid;

6. That each and all of the allegations and averments in complainants' bill of complaint contained are true and correct:

7. That heretofore upon application duly and regularly
50 made in that behalf, complainants herein discontinued and dismissed their bill of complaint herein as to the respondent, the Territory of Hawaii, originally made a party herein by said complainants, and said Territory of Hawaii is hereby relieved, released and discharged from the operation, effect and force of this decree.

8. That the respondents Abigail W. Kawananakoa and Elizabeth K. Kalanianaole were on the date said note and mortgage were executed as aforesaid, and still are the wives respectively of the respondents David Kawananakoa and Jonah Kalanianaole, and, as such wives as aforesaid, joined with said respondents David Kawananakoa and Jonah Kalanianaole in the execution of said mortgage in token of their consent thereto and in release and bar of their dower rights in and to the property hereinafter described.

9. That the said note and mortgage executed by said respondents David Kawananakoa and Jonah Kalanianaole in favor of the complainants Ellen Albertina Polyblank, otherwise known as Sister Albertina, Trustee for Stella K. Cockett, for said sum of Eight Thousand Dollars hereinabove set forth, was for a portion of the purchase price of the lands and premises hereinafter set forth and described;

10. That on the 8th day of May, 1902, when said note and mortgage were executed by the respondents David Kawananakoa and Jonah Kalanianaole in favor of the said Ellen Albertina Polyblank, otherwise known as Sister Albertina, Trustee for Stella Keomailani Cockett, there was no mistake or misunderstanding between the parties to said mortgage sued upon herein, as to the exact property conveyed by the said respondents David Kawananakoa
W. J. R. and Jonah Kalanianaole by way of mortgage to said Ellen Albertina Polyblank otherwise known as Sister Albertina Trustee for Stella K. Cockett; but on the contrary the Court finds that the respondents David Kawananakoa and Jonah Kalanianaole did then and there on said 8th day of May,
51 A. D. 1902 execute and deliver to the said Ellen Albertina Polyblank otherwise known as Sister Albertina as Trustee for

Stella K. Cockett, all the lands and premises as set forth in complainants' bill of complaint herein, without any exception or reservation whatsoever of any lands or portions of lands contained therein and especially without any exception or reservation whatsoever concerning the so-called patches or lois or Nakamakaweuweu as more particularly appears in respondents' answer herein now on file; and in this behalf I do further find that the respondents David Kawananakoa and Jonah Kalanianaole did make and execute said note and mortgage to said Ellen Albertina Polyblank otherwise known as Sister Albertina, as Trustee for Stella K. Cockett, then and there knowing and fuly understanding that the same was for the lands and premises contained in plaintiffs' bill of complaint herein without any exception, reservation or limitation whatsoever;

11. That the respondent the German Saving & Loan Society, a corporation subsequent to the execution and delivery of the note and mortgage set forth and described in complainants' bill of complaint herein, became, was and still is, a secondary incumbrancer upon a portion of the land and premises hereinafter described, but the lien of said the German Savings & Loan Society, a corporation was and is subordinate and subject to the lien of complainants herein upon said premises hereafter described; and whereas the said respondent is a secondary incumbrancer upon a portion of the land hereinafter set forth and described on page 10 hereof, to the extent of one and 95/100 acres the description thereof being as follows:

52 "All that portion of Royal Patent No. 4371, L. C. A. 7260, to B. Namakeha, at Kaalaa, Pauoa, Honolulu, Oahu, bounded and described as follows:

Beginning at the West corner of this land on Pauoa Road, the same being the North corner of L. C. A. 5957 B. Apana 3 to Kaholoau, and running by true meridian:

S. 84 50′ E. 107.4 feet along Pauoa Road;
S. 88 40′ E. 54.0 feet along same;
N. 88 30′ E. 80.5 feet alone same;
S. 24 45′ E. 52.0 feet along same;
N. 54 20′ W. 13.0 feet along same;
S. 00 55′ E. 222.3 feet along same;
S. 5 00′ E. 103.0 feet along same;
S. 55 18′ W. 23.0 feet along L. C. A. 236 to Kaholo;
N. 5 05′ W. 36.0 feet along remainder of this land;
S. 84 12′ W. 180.8 feet along stone wall;
N. 12 07′ E. 183.0 feet along L. C. A. 5957 B. Apana 4 to Kaholoau;
N. 70 35′ W. 125.0 feet along same;
N. 9 20′ E. 171.5 feet along L. C. A. 5957 B. Apana 3 to Kaholoau to the initial point, and containing an area of 1.95/100 acres."

W. J. R. Now therefore it is ordered, adjudged and decreed that the aforesaid land and property last hereinabove described under second mortgage to said respondent, The German Savings & Loan Society, a corporation shall not be sold

unless the amount received and obtained from the sale of the balance of the land and premises hereinafter described, ex-
W. J. R. clusive of that portion of the same last hereinabove described, shall be insufficient and inadequate to satisfy the amount of the judgment herein; and in case the amount realized or obtained from such sale as aforesaid shall be in-
53 sufficient to satisfy the judgment herein, then the Commissioner herein is hereby ordered to expose and offer for sale at public auction, upon the same terms hereinafter set forth, the said land and premises hereinabove described, under second mortgage to said respondent The German Savings & Loan Society, a corporation to satisfy the judgment herein.

Provided however, that said respondent shall give and furnish to the complainants herein of their attorneys a good, accurate and sufficient description of the lands and premises to be sold first by the Commissioner herein after eliminating and excluding the lands and premises under second mortgage as aforesaid to said
W. J. R. The German Savings & Loan Society, a corporation, as hereinabove described, at the expense of said respondent, the German Savings & Loan Society, a corporation.

It is ordered, adjudged and decreed that M. T. Simonton, Esq. be and is hereby appointed a Commissioner to sell the land and premises hereinafter set forth, and

It is further ordered, that before entering upon his duties as such Commissioner, he shall take the oath and give a bond in the sum of One Thousand Dollars for the faithful discharge of his duties as such Commissioner;

And it is further ordered that whatever sum or sums of money may be derived by said Commissioner as aforesaid arising out of the sale of the land and premises hereinafter set forth and described shall be by the said Commissioner turned over and delivered to Henry Smith, Esq. Clerk of the Judiciary Department of the Territory of Hawaii or to his successor or successors in office, subject to the order of this Court.

It is further ordered, adjudged and decreed, that all and singular the mortgaged premises hereinafter mentioned and described or so much thereof as may be sufficient to raise the amount due, to
54 the complainants herein for the principal and interest and costs of this suit and expenses of sale be sold at public auction by the said M. T. Simonton, Esq. Commissioner herein, upon notice of the same thereof being given, by said Commissioner, by publication in the Hawaiian Star, a newspaper of general circulation printed and published in Honolulu, Island of Oahu, Territory of Hawaii, for at least ten days from the date of the first publication thereof; and that the purchaser or purchasers at said sale pay to said Commissioner upon the fall of the hammer ten per cent. of the price bid the balance to be paid upon the delivery of the deed. And that the said Commissioner, upon the sale of the land and premises hereinafter set forth and described, and upon the report being made
W. J. R. to this Court of his proceedings herein, and upon the confirmation thereof, be and is hereby authorized and

empowered to execute a deed to the purchaser or purchasers thereof free and clear of all incumbrances or liens thereon.

It is further ordered, adjudged and decreed that the said M. T. Simonton, Commissioner herein, out of the proceeds of such sale retain his fees, and commissions on said sale and pay to Henry Smith, Esq. Clerk of the Judiciary Department of the Territory of Hawaii or to his successor or successors in office subject to the order of this Court, out of said proceeds, the sum of Forty-
W. J. R. four and 50/100 ($44.50) Dollars, costs of this suit, also the further sum of Eight Thousand Dollars and interest thereon at the rate of seven per cent. per annum from the 25th day of June, 1903, up to and including the date of the sale of the land and premises under this decree, to be sold as hereinabove set forth, or so much thereof as the said proceeds of sale will pay of the same and any overplus after the principal of the note sued upon herein together with all costs and interests herein shall have
55 been deducted shall be turned over and delivered to the respondents David Kawananakoa and Jonah Kalanianaole.

And it is further Ordered, Adjudged and Decreed, that the respondents David Kawananakoa and Jonah Kalanianaole, Abigail W. Kawananakoa, Elizabeth K. Kalanianaole and the German Savings & Loan Society, a corporation and all persons claiming or to claim from or under them, and all persons having liens or lien subsequent to said mortgage by judgment or decree upon the land and premises hereinafter described, and their personal representative, and all persons having any lien or claim by or under such subsequent judgment or decree and their heirs or personal representatives, and all persons claiming to have acquired any shares or interest in said land or premises be and they are hereby forever barred and foreclosed of and from all claim, right, interest, lien, incumbrance and equity of redemption in and to the said mortgaged premises hereinafter set forth and described and every part and parcel thereof, from and after the delivery of said Commissioner's deed;

And it is further Ordered, Adjudged and Decreed, that complainants herein may become purchasers at such sale of such Commissioner.

And it is further Ordered, Adjudged and Decreed, that the purchaser or purchasers of said mortgaged premises hereinafter described at such sale, be let into immediate possession thereof and that any of the parties to this action who may be in possession of said lands and premises or any portion thereof, and any person who since the commencement of this action has come into possession under them or either of them deliver possession thereof to such purchaser or purchasers on production of the Commissioner's deed for such premises or any part thereof.

56 And it is further Ordered, Adjudged and Decreed that if the moneys arising from the said sales shall be insufficient to pay the amount so found due complainants as above stated, with interest costs, and expenses of sale aforesaid, the Commissioner specify in his report the amount of such deficiency and balance due to com-

W. J. R.

plainants in his said sale, and that on the coming in and filing of said return, the clerk of this Court docket a judgment for such balance against the respondents David Kawananakoa and Jonah Kalanianaole and that the respondents David Kawananakoa and Jonah Kalanianaole pay to the said complainants the amount of such deficiency and judgment, with interest thereon at the rate of six per cent. per annum from the date of said last mentioned return and judgment, and that the complainants have execution therefor.

The land and premises directed to be sold by and under this decree are situate, lying and being at Honolulu, Island of Oahu, Territory of Hawaii, and being more particularly bounded and described as follows, to-wit:

A portion of Kaalaaluna, Honolulu, Kona, Oahu. L. C. Award 7260 to B. Namakeha.

"Beginning on the new South line of Pauoa Road, on the East boundary of L. C. A. 5957 B. to Kaholoau, said point being 193.5 feet from the intersection of the new South line of Pauoa Road and Nuuanu Avenue, as shown on Government Registered Map No. 2004 and running by true Azimuths:

57

1.	270	00′ 30″	441.1	feet	along	new South line of Pauoa Road;
2.	338	48′	241.0	"	"	Ulu's place;
3.	58	10′	216.5	"	"	L. C. A. 85 F. L. and 6059;
4.	56	15′	125.0	"	"	L. C. A. 236;
5.	62	05′	82.6	"	"	same;
6.	74	10′	112.0	"	"	same;
7.	179	28′	9.8	"	"	L. C. A. 11144 B. Ap. 2;
8.	86	50′	52.8	"	"	same;
9.	147	33′	71.3	"	"	same;
10.	45	10′	61.0	"	"	"
11.	138	38′	160.3	"	"	"
12.	45	10′	6.0	"	"	"
13.	154	15′	9.5	"	"	Kaalaaialo;
14.	223	10′	110.5	"	"	"
15.	259	17′	9.7	"	"	"
16.	223	00′	117.5	"	"	"
17.	188	00′	65.0	"	"	"
18.	189	51′	95.2	"	"	L. C. A. 5957 to point of beginning.

Area 5.17 Acres.

together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in any wise appertaining.

Dated Honolulu, Oahu, May 4th, 1905.

(Signed) W. J. ROBINSON,
Third Judge, Circuit Court of the First Judicial Circuit, Territory of Hawaii, Sitting at Chambers, in Equity.

Endorsed: E. 1431. R. 1/194. Circuit Court, First Circuit. Territory of Hawaii. At Chambers. In Equity. Ellen Albertina Polyblank, otherwise known as Sister Albertina, Trustee for Stella Keomailani Cockett and Stella K. Cockett, sole beneficiary under said trust, Complainants, *vs.* David Kawananakoa, Jonah Kalanianaole, Abigail W. Kawananakoa, Elizabeth K. Kalanianaole, The German Savings and Loan Society, a corporation and The Territory of Hawaii, Respondents. Decree of Foreclosure. Filed May 5th, 1905 at 10:15 o'clock A. M. M. T. Simonton Clerk.

58 *Extracts from the Minute Book of the Department of the Circuit Court for the First Circuit, Territory of Hawaii, Presided over by the Third Judge Thereof.*

In the cause of:

ELLEN ALBERTINA POLYBLANK ET AL.
vs.
DAVID KAWANANAKOA ET AL.

Bill for Foreclosure of Mortgage.

THURSDAY, *October* 13, 1904.

Present: Honorable W. J. Robinson, Third Judge. M. T. Simonton, Clerk.

Cause on to be heard this day, the motion of plaintiff herein for permission and leave to amend the return of service on the summons herein, heretofore returned and filed in this court, upon the ground that the said return of service is uncertain, ambiguous and unintelligible for that it does not appear and it cannot be ascertained therefrom whether the defendants David Kawananakoa and Abigail W. Kawananakoa were served by Albert McGurn, Deputy Sheriff of the Island of Oahu, Territory of Hawaii, or whether said summons was served by W. M. S. Lindsey, Deputy Sheriff of the District of Waimea, Island of Hawaii in said Territory; E. A. Douthitt, Esq., appearing as attorney for plaintiff.

The Court grants the motion.

59 Title of Court and Cause.

MONDAY, *November* 14, 1904.

By consent of counsel and order of the Court, hearing of respondents' Demurrers to complainants' complaint herein, set for 9 o'clock a. m. this day, is continued until Thursday, November 17, A. D. 1904, at 9 o'clock a. m.

Title of Court and Cause.

THURSDAY, *November* 17, 1904.

Cause on to be heard at 9 o'clock a. m. this day, the demurrers of respondents David Kawananakoa, Jonah Kalanianaole, Abigail W. Kawananako and Elizabeth K. Kalanianaole, to complainants' bill of complaint herein; C. W. Ashford Esq. appearing as attorney for respondents and E. A. Douthitt, Esq. appearing for complainants. Counsel argue.

Mr. Douthitt moves to amend complaint by adding the name of Stella Keomailani Cockett, sole beneficiary under said trust deed, as party plaintiff; also that the bill be further amended by striking out the words "of San Francisco" (wherever same occur throughout the bill) after the words "German Savings and Loan Society."

The motion to amend is granted, and the clerk is directed to make the amendments noted.

The Court then orders.

"The demurrers may stand submitted on briefs to be filed in or before Monday, November 21, A. D. 1904, at 4 o'clock p. m."

L. J. Warren Esq. of counsel for respondent German Savings and Loan Society, now appears in court, and asks that the de-
60 murrer of said respondent be considered submitted.

It is so ordered.

Title of Court and Cause.

WEDNESDAY, *November* 23, 1904.

The Court having heretofore, to wit, on Thursday, November 17 A. D. 1904, taken respondents' demurrers to complainants' bill of complaint under advisement, this day render its decision herein, in writing, as follows:

"It is ordered that the several demurrers of the respondents David Kawananakoa, Jonah Kalanianaole, Abigail W. Kawananakoa, and Elizabeth K. Kalanianaole and The German Savings and Loan Society, a corporation, be and the same are and each of them is hereby overruled, with leave to answer with- five (5) days."

C. W. Ashford Esq. counsel for respondents David Kawananakoa Jonah Kalanianaole, Abigail W. Kawananakoa and Elizabeth K. Kalanianole, notes an exception to the order overruling the demurrer.

Title of Court and Cause.

MONDAY, *February* 6, 1905.

The hearing and trial of the above entitled cause having been set for 9 o'clock a. m. this day, E. A. Douthitt Esq. appears as attorney for complainants; C. W. Ashford Esq. appears as attorney for respondents David Kawananakoa, Jonah Kalanianaole, Abigail W. Kawananakoa and Elizabeth K. Kalanianole and L. J. Warren Esq.

as attorney for respondent The German Savings and Loan Society.

61 Mr. Ashford objects to the hearing and trial proceeding at this time on the ground that the plea to the jurisdiction of this Court heretofore filed by respondents David Kawananakoa, Jonah Kalanianaole, Abigail W. Kawananakoa and Elizabeth K. Kalanianaole, has not as yet been disposed of.

Mr. Ashford reads and argues on plea of respondents.

Mr. Douthitt argues.

The Court overrules the plea, with leave to answer within two days.

Mr. Ashford notes an exception.

Title of Court and Cause.

SATURDAY, *February* 11, 1905.

The hearing and trial of the above entitled cause having been set for 9 o'clock a. m. this day, E. A. Douthitt Esq. appears as attorney for complainants, and A. Lewis Jr. Esq. appears as attorney for respondent The German Savings and Loan Society.

W. S. Edings representing C. W. Ashford Esq. attorney for respondents David Kawananakoa, Jonah Kalanianaole, Abigail W. Kawananakoa and Elizabeth K. Kalanianaole, announces in open court that Mr. Ashford is now in Hilo, and therefore ask that the hearing be deferred until Mr. Ashford's return, Mr. Edings stating that he will return this afternoon.

The court therefore continues the cause until Tuesday, February 14, A. D. 1905 at 4:30 o'clock p. m.

Title of Court and Cause.

The hearing of the above entitled cause having been set

62 for 4:30 o'clock p. m. E. A. Douthitt Esq. appears as attorney for complainants, C. W. Ashford Esq. appears as attorney for respondents David Kawananakoa, Jonah Kalanianaole, Abigail W. Kawananakoa and Elizabeth K. Kalanianaole, and A. Lewis Jr. Esq. appears as attorney for respondent The German Savings and Loan Society.

Mr. Ashford asks for 48 hours' time in which to amend answers of respondents David Kawananakoa, Jonah Kalanianaole, Abigail W. Kawananakoa and Elizabeth K. Kalanianaole, or to file a cross-bill, on the ground that, through inadvertence there was included certain property in the mortgage that should not have been so included.

Mr. Douthitt objects to any further continuance.

Counsel argue.

Mr. Lewis asks leave to amend answer of respondent The German Savings and Loan Society.

Thereupon the Court orders:

"The motions are granted, and each and all respondents are allowed up to and including Thursday, February 16, A. D. 1905, in

which to amend their answers or to take such further steps or file such further pleadings as they may be advised."

Title of Court and Cause.

FRIDAY, *April* 14, 1905.

This cause came on regularly for hearing and trial at 1.30 o'clock p. m. E. A. Douthitt Esq. appears as attorney for petitioners; C. W. Ashford Esq. appearing as attorney for respondents David Kawananakoa Jonah Kalanianaole, Abigail W. Kawananakoa and Elizabeth K. Kalanianaole and A. Lewis Jr. Esq. appearing as attorney for The German Savings and Loan Society.

63 Mr. Douthitt offers in evidence a mortgage made and entered into on the 8th day of May A. D. 1902, by and between David Kawananakoa and Jonah K. Kalanianaole parties of the first part, and Ellen Albertina Polyblank, Trustee, party of the second part; recorded in the office of the Registrar of Conveyances in Liber 232 on pages 422, 423, 424.

Received in evidence and marked Complainants' Exhibit "A."

Ellen Albertina Polyblank is called, sworn and examined as a witness on behalf of complainants.

Mr. Douthitt offers in evidence a promissory note for $8000.00 dated May 8, 1902, payable to Ellen Albertina Polyblank Trustee, and signed by David Kawananakoa and Jonah K. Kalanianaole.

Received in evidence and marked complainants' Exhibit "B."

Edgar Henriques and M. D. Monsarrat are called, sworn and examined as witnesses on behalf of complainants.

Mr. Douthitt offers in evidence a written "Description of a portion of Kaalualoma, L. C. A. 7260, to B. Namakeha," made and signed by M. D. Monsarrat and Olaf L. Sorenson, surveyors.

Received in evidence and marked complainants' Exhibit "C."

Mr. Douthitt offers in evidence a map made by M. D. Monsarrat, Surveyor.

Received in evidence and marked complainants' Exhibit "D."

Mr. Ashford moves that Exhibits "C" and "D" be stricken from the files.

The court denies the motion.

Mr. Ashford notes an exception.

Complainants here rest.

John F. Colburn is called, sworn and examined as a witness on behalf of respondents.

At 4:30 o'clock p. m. the court continues further hearing herein until Thursday April 27, A. D. 1905, at 10 o'clock a. m.

64 Title of Court and Cause.

APRIL 27, 1905.

Further hearing and trial of the above entitled cause, set for 10 o'clock a. m. this day, is, by consent of counsel and order of the Court, continued until Saturday, April 29, A. D. 1905, at 9:30 o'clock a. m.

Title of Court and Cause.

SATURDAY, *April* 29, 1905.

Of the Court's own motion, the further hearing and trial of the above entitled cause, set for 9:30 o'clock a. m. this day, is continued until Wednesday, May 3, A. D. 1905, at 10 o'clock a. m.

Title of Court and Cause.

MAY 3, 1905.

This cause came on for further trial at 10 o'clock a. m. E. A. Douthitt Esq. appearing as attorney for complainants; C. W. Ashford Esq. appearing as attorney for respondents David Kawananakoa, Jonah Kalanianaole, Abigail W. Kawananakoa and Elizabeth K. Kalanianaole, and A. Lewis Jr. Esq., appearing as attorney for respondent The German Savings and Loan Society.

John F. Colburn is recalled as a witness on behalf of respondents.

Direct examination by Mr. Ashford.

Mr. Ashford offers in evidence a map of premises in dispute.

Received in evidence and marked respondents' Exhibit "1."

65 Mr. Ashford offers in evidence record in case of Sister Albertina, Trustee *vs.* Kapiolani Estate, Limited, (Law Division, No. 5035).

Received in evidence and marked respondents' Exhibit "2."

Cross examination by Mr. Douthitt.

Mr. Douthitt offers in evidence a letter, dated April 26, 1904, addressed to Sister Albertina, Trustee, and signed John F. Colburn.

Received in evidence and marked complainants' Exhibit "E."

Re-direct examination by Mr. Ashford.

Mr. Ashford offers in evidence a deed, executed by William Henry, High Sheriff, to Adrian M. Keoho, dated January 20, 1905.

Mr. Douthitt objects to offer.

The Court sustains the objection.

Mr. Ashford notes an exception, and moves that the deed be marked, for identification, respondents' Exhibit "3."

Exception allowed, and motion granted.

At 12:10 o'clock p. m. the court continues further hearing and trial herein until 2 o'clock p. m. to which time Court takes a recess.

Afternoon Session.

Title of Court and Cause.

This cause came on for further hearing and trial at 2 o'clock p. m. E. A. Douthitt Esq. appearing as attorney for complainants; C. W. Ashford Esq. appearing as attorney for David Kawananakoa, Jonah Kalanianaole, Abigail W. Kawananakoa and Elizabeth K. Kalanianaole, and A. Lewis Jr. Esq. appearing as attorney for respondent The German Savings and Loan Society.

Mr. Ashford offers in evidence record and files in case of W. W. Dimond & Company, Limited, *vs.* Jonah K. Kalanianaole, (Law Division, No. 5718).

Mr. Douthitt objects to offer.

66 The Court sustains the objection.

Respondents here rest.

Charles F. Peterson is called, sworn and examined as a witness in rebuttal by complainants.

Direct examination by Mr. Douthitt.

Cross examination by Mr. Ashford.

Complainants rest.

No sur-rebuttal.

Mr. Ashford and Mr. Lewis argue.

Thereupon the Court orders:

"The affirmative relief prayed for by the respondents David Kawananakoa and Jonah K. Kalanianaole is denied; the motion of respondent The German Savings and Loan Society that the property in which it holds a mortgage be sold last is granted, provided said respondent The German Savings and Loan Society furnish a description of premises after elimination."

It is further ordered that the prayer of the bill be and the same is hereby granted.

M. T. Simonton is appointed Commissioner to sell the property with bond in the sum of $1000.00. Sale to be for cash; 10% on fall of the hammer; balance upon execution and delivery of deeds to purchaser or purchasers. Notice of time and place of holding sale to be had by publication in the Hawaiian Star for ten (10) days prior to date of sale.

Mr. Ashford gives notice of appeal to the Supreme Court.

67 Title of Court and Cause.

Came on to be heard this day complainants' motion for taxation of costs in the above entitled cause; E. A. Douthitt Esq. appearing as attorney for complainants; and A. Lewis Jr. Esq. appearing as attorney for respondent The German Savings and Loan Society.

Mr. Douthitt presents and reads complainants' bill of costs.

Counsel argues.

Thereupon the Court orders:

"Let complainants' costs be taxed and allowed in the sum of $44.50, eliminating and disallowing the last item of said bill of costs as presented. $40.00 for surveyors' fees."

Mr. Douthitt notes an exception.

Mr. Douthitt thereupon presents proposed decree of foreclosure.

The final decree as presented is signed by the Court.

I, M. T. Simonton, Clerk of the Circuit Court for the First Circuit of the Territory of Hawaii, do hereby certify that the above and foregoing are true extracts from the Minute Book, kept by the Clerk of said Circuit Court, of and concerning the matters coming, and which have come before the Third Judge of said Circuit Court; and I do further certify that the above and foregoing constitute a

full, complete and accurate copy of all and singular the minute orders, and Minute Book entries in and concerning the above entitled cause, of Ellen Albertina Polyblank, *et al. vs.* David Kawananakoa *et al.*, heretofore pending, before said Circuit Court, and the Third Judge thereof, at Chambers in Equity.

Witness my hand and the seal of said Circuit Court at
68 Honolulu, in said Circuit this 2d day of October, 1905.

[SEAL.] (Signed) M. T. SIMONTON, *Clerk.*

Endorsed: In the Supreme Court of the Territory of Hawaii. October Term & Session, 1905. Ellen Albertina Polyblank *et al.*, Appellees, *vs.* David Kawananakoa *et al.*, Appellants. Certified copy of Minute Orders. Filed October 2d, 1905 at 2 o'clock P. M. M. T. Simonton, Clerk. Clarence W. Ashford, Attorney for Def't-Appellants.

69 In the Circuit Court for the First Circuit, Territory of Hawaii, at Chambers. In Equity.

ELLEN ALBERTINA POLYBLANK, Otherwise Known as SISTER ALBERTINA, Trustee for Stella Keomailani Cockett, and STELLA K. COCKETT, Sole Beneficiary under said Trust, Complainants,

vs.

DAVID KAWANANAKOA, JONAH KALANIANAOLE, ABIGAIL W. KAWANANAKOA, ELIZABETH K. KALANIANAOLE, THE GERMAN SAVINGS & LOAN SOCIETY, a Corporation, and THE TERRITORY OF HAWAII, Respondents.

Notice of Appeal.

The defendants David Kawananakoa, Jonah Kalanianaole, Abigail W. Kawananakoa and Elizabeth K. Kalanianaole, in the above entitled cause hereby give notice that they will appeal, and they do hereby appeal to the Supreme Court of the Territory of Hawaii, from the Decree signed and filed herein on, to-wit, the 5th day of May, 1905.

Dated this 8th day of May, 1905.

(Signed) C. W. ASHFORD,
Attorney for said Defendants.

Endorsed: E. 1431. Circuit Court, First Circuit. Territory of Hawaii. At Chambers. In Equity. Ellen Albertina Polyblank, otherwise known as Sister Albertina, Trustee etc. *vs.* David Kawananakoa, *et al.* Notice of Appeal. Indexed J. A. T. Clerk. E. 1/194 Filed May 10, 1905 at 10:40 a. m. J. A. Thompson, Clerk. C. W. Ashford, Attorney for said Defendants.

70 In the Supreme Court of the Territory of Hawaii, October Term, 1905.

ELLEN ALBERTINA POLYBLANK, Otherwise Known as SISTER ALBERTINA, Trustee for Stella Keomailani Cockett, and STELLA K. COCKETT, Sole Beneficiary under said Trust,

v.

DAVID KAWANANAKOA, JONAH KALANIANAOLE, ABIGAIL W. KAWANANAKOA, ELIZABETH K. KALANIANAOLE, and THE GERMAN SAVINGS AND LOAN SOCIETY, a Corporation.

Appeal from Circuit Judge, First Circuit.

Argued October 4, 1905. Decided October 23, 1905.

Frear, C. J., Hartwell and Wilder, JJ.

Mortgage foreclosure—parties—deficiency judgment.—A suit to foreclose a mortgage may be brought against the mortgagors without joining a subsequent purchaser of a portion of the mortgaged premises, and a deficiency judgment against the mortgagors may be authorized without first foreclosing the interest of the subsequent purchaser when that subsequent purchaser is the Territory of Hawaii.

71 Opinion of the Court by WILDER, *J.*:

This is an appeal from a decree of foreclosure and sale under a mortgage from D. Kawananakoa and J. Kalanianaole to Sister Albertina, trustee for Stella K. Cockett. The suit was brought by the mortgagee against the mortgagors and their wives, the German Savings & Loan Society, a junior mortgagee of a portion of the mortgaged premises, and the Territory of Hawaii, and later discontinued as to the Territory. After the execution of the mortgage the mortgagors conveyed a portion of the mortgaged premises to S. M. Damon, who, in turn, conveyed it to the Territory. The decree authorized the entry of a deficiency judgment against the mortgagors in case the proceeds from a sale of the mortgaged premises should be found to be insufficient to pay the amount due.

The first claim of appellants is that the decree should be reversed because a purchaser, subsequent to the mortgage, of a portion of the mortgaged premises was not made a party to the suit. It is clear that, unless joined as a party, the rights of a subsequent purchaser cannot be affected or concluded by the decree. The mortgagors have no reason to complain because their interest in the mortgaged premises is foreclosed without joining the subsequent purchaser of a portion. It follows that the foreclosure is good as far as it goes. See *Childs v. Childs*, 10 O. St. 339; *Landon v. Townshend*, 112 N. Y. 93; 2 Jones on Mortgages, Sec. 1395; *Kay v. Whittaker*, 44 N. Y. 565; *Merriman v. Hyde*, 2 N. W. 218.

It is further claimed that no deficiency judgment should be entered against the mortgagors until all of the mortgaged premises are sold. All that the mortgagors can claim is that the mortgagee should foreclose on and have sold all of the mortgaged property that is possible, that is, that she should foreclose all that the law allows her to foreclose, before entering up a deficiency judg-
72 ment. In this case all of the mortgaged property is to be sold except that part which is now held by the Territory. The interest of the Territory in that portion cannot be foreclosed and sold without joining the Territory as a party defendant, and that cannot be done. See chapter 129 of the Revised Laws. The mortgagee has done all that she can, and it would be inequitable that she should suffer throught no fault of her own, particularly when the mortgagors have received a substantial befefit by reason of the transfer.

Clark *v.* Simmons, 8 N. Y. Supp. 74, cited in 2 Jones, Mortgages, Sec. 1709 B, is in point. In that case it was held that where a mortgage on land partly in New York and partly in another state was foreclosed in New York as to the land therein and that land was sold plaintiff could have a judgment for a deficiency without foreclosing as to the land in the other state as the New York courts could not order a sale of that land. The California cases cited by appellants on this question are not in point, as they are controlled by a statute which has no force in this Territory.

Appellants also claim that the decree, in describing the land to be sold, is erroneous in that is does not follow the description in the mortgage. The circuit judge found, as a matter of fact, against this contention. So far as appears on this appeal we cannot see that the circuit judge erred, and therefore this objection must be overruled.

The decree appealed from is affirmed.

(Signed) W. F. FREAR.
(Signed) ALFRED S. HARTWELL.
(Signed) A. A. WILDER.

E. A. Douthitt for plaintiffs.
C. W. Ashford for defendants.

Endorsed: Supreme Court Territory of Hawaii. E. A. Polyblank *et al. vs.* D. Kawananakoa. Decision. Filed Oct. 23, 1905. George Lucas, Clerk.

73 In the Supreme Court of the Territory of Hawaii.

DAVID KAWANANAKOA, JONAH KALANIANAOLE, ABIGAIL W. KAWANANAKOA, and ELIZABETH K. KALANIANAOLE, Appellants,

vs.

ELLEN ALBERTINA POLYBLANK, Otherwise Known as SISTER ALBERTINA, Trustee for Stella Keomailani Cockett, and STELLA K. COCKETT, Sole Beneficiary under said Trust, Appellees.

Certificate of Clerk to Transcript of Record.

HONOLULU, OAHU, *Territory of Hawaii, ss:*

I, Henry Smith, Clerk of the Supreme Court of the Territory of Hawaii, do hereby certify the above and foregoing to be a full, true and correct transcript of the record and proceedings had in the said Supreme Court of the Territory of Hawaii in the case entitled in said Court, "Ellen Albertina Polyblank, otherwise known as Sister Albertina, Trustee for Stella Keomailani Cockett and Stella K. Cockett, sole beneficiary under said Trust, *vs.* David Kawananakoa, Jonah Kalanianaole, Abigail W. Kawananakoa and Elizabeth K. Kalanianaole, and The German Savings & Loan Society, a corporation," as required by the præcipe of the attorneys of appellants attached hereto.

In testimony whereof I have hereunto set my hand and caused the seal of the said Supreme Court of the Territory of Hawaii, to be hereunto affixed at Honolulu in said Territory this 23rd day of February A. D. 1906.

[Seal Supreme Court, Territory of Hawaii.]

HENRY SMITH,

Clerk of the Supreme Court of the Territory of Hawaii.

74 In the Supreme Court of the Territory of Hawaii.

DAVID KAWANANAKOA, JONAH KALANIANAOLE, ABIGAIL W. KAWANANAKOA, and ELIZABETH K. KALANIANAOLE, Appellants,

vs.

ELLEN ALBERTINA POLYBLANK, Otherwise Known as SISTER ALBERTINA, Trustee for Stella Keomailani Cockett, and STELLA K. COCKETT, Sole Beneficiary under said Trust, Appellees.

Petition for Appeal.

The above named appellants, David Kawananakoa, Jonah Kalanianaole, Abigail W. Kawananakoa and Elizabeth K. Kalanianaole respectfully show that a cause is now pending in the Supreme Court of the Territory of Hawaii entitled Ellen Albertina Polyblank, otherwise known as Sister Albertina, Trustee for Stella Keomailani Cockett, and Stella K. Cockett, sole beneficiary under said Trust *vs.* David Kanananakoa, Jonah Kalanianaole, Abigail W. Kawananakoa, Elizabeth K. Kalanianaole and The German Savings & Loan

Society, a corporation, being a bill in equity to foreclose a mortgage, and that a judgment or decree has therein been rendered on the 23rd day of October, A. D. 1905, affirming the decree of the Circuit Court of the First Circuit dated May 4, 1905; that the matter in controversy in said suit exceeds Five Thousand Dollars ($5000.) besides costs; that the German Savings & Loan Society, a corporation, was made a party to the suit as holder of a second mortgage upon the premises in question; that the decree of the Circuit Court of the First Circuit was severable in fact and in law as between the interests of the present appellants and those of said The German Savings & Loan Society; that said The German Savings & Loan Society refused to join in the appeal to the Supreme Court of the Territory of
75 Hawaii, and refuses to join in this appeal; that the interests of said German Savings & Loan Society are not affected by this appeal; that the decree of the Circuit Court of the First Circuit contains a recital of the facts upon which said decree was based and that said findings were affirmed and further facts found and stated by the Supreme Court of the Territory of Hawaii in said judgment or decree of October 23, 1905; that said judgment or decree of the Supreme Court of the Territory of Hawaii is a final judgment or decree and that this is a proper cause to be reviewed by the Supreme Court of the United States on appeal. Wherefore the said appellants pray that an appeal be allowed them in the above recited cause directing the clerk of the Supreme Court of the Territory of Hawaii to send the record and proceedings in said cause with all things concerning the same, except the transcript of evidence, to the Supreme Court of the United States in order that the errors complained of in the assignment of errors herewith filed by the said appellants may be reviewed and if error be found corrected according to the laws and customs of the United States.

Honolulu, November 16, 1905.

DAVID KAWANANAKOA,
JONAH KALANIANAOLE,
ABIGAIL W. KAWANANAKOA,
ELIZABETH K. KALANIANAOLE,
By Their Attorneys, C. W. ASHFORD,
BALLOU & MARX.

76 In the Supreme Court of the Territory of Hawaii.

DAVID KAWANANAKOA, JONAH KALANIANAOLE, ABIGAIL W. KAWANANAKOA, and ELIZABETH K. KALANIANAOLE, Appellants,

vs.

ELLEN ALBERTINA POLYBLANK, Otherwise Known as SISTER ALBERTINA, Trustee for Stella Keomailani Cockett, and STELLA K. COCKETT, Sole Beneficiary under said Trust, Appellees.

Assignment of Errors.

The appellants in the above entitled cause in connection with their petition for appeal herein present and file therewith their assignment of errors as to which matters and things they say that the judgment

or decree entered herein on the 23rd day of October, 1905, is erroneous, to wit:

First. That the Court erred in holding that the decree authorizing foreclosure of the mortgage in question should not be reversed because a purchaser subsequent to the mortgage of a portion of the mortgaged premises was not made a party to the suit.

Second. That the Court erred in holding that the decree authorizing the foreclosure of the mortgage should be affirmed under the circumstances set forth in the opinion of said Supreme Court, to wit, that after the execution of the mortgage the mortgagors conveyed a portion of the mortgaged premises to S. M. Damon, who in turn conveyed it to the Territory; that the suit was originally brought by the mortgagee against the Territory of Hawaii as well as other defendants and later discontinued as to the Territory of Hawaii.

Third. That the Court erred in affirming that portion of the decree authorizing the entry of a deficiency judgment before all of the mortgaged premises are sold.

77 Fourth. That the Court erred in holding that a deficiency judgment should be entered before that portion of the mortgaged premises now held by the Territory of Hawaii was sold.

Fifth. That the Court erred in holding that the Territory of Hawaii could not be joined as a party defendant in a bill to foreclose a mortgage.

Sixth. That the Court erred in holding that when the Territory of Hawaii becomes the purchaser of lands subject to a mortgage a bill in equity to foreclose said mortgage cannot be maintained against the Territory of Hawaii.

Wherefore the appellants pray that said judgment or decree may be reversed and that the appellants may have an adjudication and decree in their favor as herein specified.

Honolulu, November 16th, 1905.

C. W. ASHFORD,
BALLOU & MARX,
Attorneys for Appellants.

78 In the Supreme Court of the Territory of Hawaii.

DAVID KAWANANAKOA, JONAH KALANIANAOLE, ABIGAIL W. KAWANANAKOA, and ELIZABETH K. KALANIANAOLE, Appellants,

vs.

ELLEN ALBERTINA POLYBLANK, Otherwise Known as SISTER ALBERTINA, Trustee for Stella Keomailani Cockett, and STELLA K. COCKETT, Sole Beneficiary under said Trust.

Order Allowing Appeal.

It is hereby ordered that the appeal of the above named appellants in the cause entitled Ellen Albertina Polyblank, otherwise known as Sister Albertina, Trustee for Stella Keomailani Cockett, and Stella K. Cockett, sole beneficiary under said Trust *vs.* David Kawananakoa, Jonah Kalanianaole, Abigail W. Kawananakoa, Elizabeth K. Kalanianaole and the German Savings & Loan Society, a corpora-

tion, to the Supreme Court of the United States be and is hereby allowed as prayed.

Honolulu, T. H., Nov. 16, 1905.

W. F. FREAR,
Chief Justice of the Supreme Court of the Territory of Hawaii.

79 In the Supreme Court of the Territory of Hawaii.

DAVID KAWANANAKOA, JONAH KALANIANAOLE, ABIGAIL W. KAWANANAKOA, and ELIZABETH K. KALANIANAOLE, Appellants,

vs.

ELLEN ALBERTINA POLYBLANK, Otherwise Known as SISTER ALBERTINA, Trustee for Stella Keomailani Cockett, and STELLA K. COCKETT, Sole Beneficiary under said Trust.

Citation to Appellees on Appeal.

To Ellen Albertina Polyblank, otherwise known as Sister Albertina, Trustee for Stella Keomailani Cockett, and Stella K. Cockett, sole beneficiary under said Trust:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States at the City of Washington in the District of Columbia, thirty days after the date of this Citation pursuant to an appeal allowed and filed in the Clerk's Office of the Supreme Court of the Territory of Hawaii wherein David Kawananakoa, Jonah Kalanianaole, Abigail W. Kawananakoa and Elizabeth K. Kalanianaole are appellants and you are appellees to show cause if any there be why the decree rendered against the said appellants as in said appeal mentioned should not be corrected and why speedy justice should not be done the parties in that behalf.

Witness the Honorable W. F. Frear, Chief Justice of the Supreme Court of the Territory of Hawaii, this 16th day of November, 1905.

W. F. FREAR,
Chief Justice Supreme Court, Territory of Hawaii.

Service of a copy of the within Citation is hereby acknowledged this 16th day of November, 1905. E. A. DOUTHITT,
Attorney for Appellees.

80 [Endorsed:] E. 1431. Supreme Court. Territory of Hawaii. David Kawananakoa, *et al.*, Appellants, *vs.* Ellen Albertina Polyblank, *et al.* Appellees. Petition for Appeal. Assignment of Errors. Order Allowing Appeal. Citation. Filed Nov. 16, 1905. George Lucas Clerk. C. W. Ashford Ballou & Marx 303 Stangenwald Bldg. Honolulu Attorneys for Appellants. (Office No:—.)

Endorsed on cover: File No. 20,223. Hawaii Territory, supreme court. Term No. 273. David Kawananakoa, Jonah Kalanianaole, Abigail W. Kawananakoa, and Elizabeth K. Kalanianaole, appellants, *vs.* Ellen Albertina Polyblank, otherwise known as Sister Albertina, Trustee for Stella Koemailani Cockett, and Stella K. Cockett, sole beneficiary under said trust. Filed April 26th, 1906. File No. 20,223.